

FREEDOM OF MOVEMENT: THE RIGHT OF A UNITED KINGDOM CITIZEN TO LEAVE HIS COUNTRY

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I. INTRODUCTION

The institution of the passport as an identity and travel document is of respectable antiquity. A brief view¹ of some of the ancient civilizations will illustrate the point. The international law historian, T. A. Walker, wrote that some ancient societies developed concepts of citizenship and nationality.² The Greek municipality-states, as autonomous political entities, varied in their practices as do the nations of today. Certain city-states such as Sparta and Argos forbade their citizens to go abroad while the contrary was true for the citizens of Athens.³ Those city-states which followed a more liberal policy towards travel furnished foreign travellers with a passport in times of peace as well as war, to ensure the holder's safety during the visit. This practice was rather common in the Hellenic world.⁴ A more restrictive practice, but not widely exercised, was the issuance of a passport by the peoples' assembly to its citizens who wished to travel.⁵ The purpose of the document was to assure the holder of certain courtesies while on foreign soil.

Rome adopted some of the Greek practices which were later employed in her world-state. One policy copied from the Greeks was that of freedom of travel within the Empire which encouraged a thriving tourist trade.⁶ The ordinary Roman traveller did not receive a passport although travellers of some note received a document called a *tractoria*, which was more or less regarded as a letter of recommendation.⁷ On the other hand, distinguished Romans received a document called a *diploma* for journeying abroad⁸ which served the purposes of a passport in that day.

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¹ For a more detailed historical review of the passport see E. Reale, *Le problème des passeports*, 50 *Recueil des cours*, 89-188 at pp. 93-97 (1934-IV).

² See 1 T. A. WALKER, *A HISTORY OF THE LAW OF NATIONS* 46 et seq. (1899).

³ 1 C. PHILLIPSON, *THE INTERNATIONAL LAW AND CUSTOMS OF ANCIENT GREECE AND ROME* 128-129 (1911). It is well also to recall the words of Plato with respect to travel; he said in *LAWS*, XII, Section 950: "In the first place, let no one be allowed to go anywhere at all into a foreign country who is less than forty years of age, and no one shall go in a private capacity, but only in some public one, as a herald, or on an embassy, or on a sacred mission. Going abroad on an expedition or in war is not to be included among travels of the class authorized by the state." B. JOWETT, *THE DIALOGUES OF PLATO* 339 (3d ed. 1924).

⁴ 1 C. PHILLIPSON, *supra* note 3, at 132-33.

⁵ See E. Reale, *supra* note 1, at 94.

⁶ 1 L. FRIEDLANDER, *ROMAN LIFE AND MANNERS UNDER THE EARLY EMPIRE* 299-394 (7th ed. 1908-1913).

⁷ E. Reale, *supra* note 1, at 95.

⁸ C. PHILLIPSON, *supra* note 3, at 275. Pliny enquired about the validity of expired *diploma*.

The ancient Israelites were acquainted with the need of a passport. Nehemiah, after all, was mindful to secure this document to identify himself as a servant of the king prior to embarking upon his trip.⁹ One of the early great travellers, the Arab, Ibn Wahab, left for posterity a picture of passport procedure—China during the Tang dynasty (618-908); he observed that,

If a man would travel from one province to another, he must take two passes with him, one from the governor, the other from the eunuch (or lieutenant). The governor's pass permits him to set out on his journey and contains the names of the traveller and those also of his company, also the pages of the one and the other and the clan to which he belongs. For every traveller in China, whether a native or an Arab, or other foreigner, cannot avoid carrying a paper with him containing everything by which he can be verified. The eunuch's pass specifies the quantities of money or goods which the traveller and those with him take along; this is done for the information of officers at the frontier places where these two passes are examined. Whenever a traveller arrives at any of them, it is registered that "Such a one, son of such a one, of such a calling, passed here on such a day, month, and year, having such things with him . . ."¹⁰

Evidence of the institution of passports as travel documents in the ancient Indian States has survived. One State designated a governmental official, the Superintendent of Passports to "issue passes at the rate of a masha a pass."¹¹ The populace of the State were further informed that "whoever is provided with a pass shall be at liberty to enter into or go out of, the country. Whoever, being a native of the country, enters into or goes out of the country without a pass shall be fined 12 panas."¹² Moreover, it seems that even at this age, States were plagued by the forgery of passports. Kautilya informs us that the individual "shall be punished with the first amercement for producing a false passport," while "a foreigner guilty of the same offence shall be punished with the highest amercement."¹³

mata, the imperial authorization for messengers carrying official correspondence and travelling officials, who moved between Rome and the Provinces. The Emperor Trajan responded that these expired official passes must not be used and that he would remedy the situation by sending out new passes through all the Provinces. These new passes were supplied to the governors of the Provinces who completed and validated the pass whenever required. Abuse of this privilege later resulted in the issuance of *diplomata* by the emperors—See Document 212, Rescript of Trajan on Passports 112 A.D., A. C. JOHNSON, P. R. COLEMAN-NORTON & F. C. BOURNE, *ANCIENT ROMAN STATUTES* (1961).

⁹ *Nehemiah* 2 : 7, Old Testament, Revised Version states: "Moreover I said unto the King, if it please the King, let letters be given to the governors beyond the river, that they may let me pass through till I come unto Judah."

¹⁰ 1 J. T. REINAUD, *RELATION DES VOYAGES FAITS PAR LES ARABES ET LES PERSONS DANS L'INDE ET A LA CHINE LE IXME SIECLE DE L'ERE CHRETIENNE* 41 (1945), as cited and translated by V.K.W. KOO, *THE STATUS OF ALIENS IN CHINA* 425 (1912).

¹¹ KAUTILYA'S *ARTHASASTRA* 179 (translated from Sanskrit by R. Shamasastri) 176 (1915). Kautilya's work claims to date from B.C. 321-296.

¹² *Id.* at 176-7. Fines for the individual travelling without the proper pass are also mentioned by S. V. VISWANATHA, *INTERNATIONAL LAW IN ANCIENT INDIA* 69 n.1 (1925). See also, 1 *THE CAMBRIDGE HISTORY OF INDIA* 487 for passport in the Maurya Empire.

¹³ R. SHAMASASTRI, *supra* note 11, at 177.

The last of the ancient civilizations which I shall mention, the Persians, had a passport of a slightly different nature. Apollonios of Tyana, who travelled from Agbatana to India in the middle of the first century A.D. related:

The guiding camel bore a golden tablet on the forehead, as a sign for all they met with, that the traveler was one of the king's friends and traveled with royal authorization.¹⁴

Today, Governments restrain their citizens from traveling abroad by various devices including the demand that the citizen possess a valid passport before lawfully leaving the country. I believe that much can be gained from a historico-legal examination of a country's practice where this practice still persists. Accordingly, I have selected the practice of the United Kingdom for such treatment since that country has long been looked upon as a liberal practitioner where a passport is not required by one of its citizens in order to leave his country. A second reason for the choice of the United Kingdom (and England as its direct antecedent), is predicated on the fact that yeomanly piecemeal efforts have been made over the years to study the English practice but none of the attempts have touched the roots of its development or traced the entire development thereafter.

II

Through the centuries, scholars have been divided as to whether or not the subject was entitled by the common law to leave England. FitzNeal, Glanvill and Bracton, three of the earliest writers on the common law did not deal with the question. Fleta,¹⁵ and Britton,¹⁶ both writing about the time of Edward I, maintain that the subject could only leave the country after securing the required licence from the monarch. Fitz-Herbert,¹⁷ writing in 1534 was of the opinion that the subject was at liberty to leave without a licence. Coke¹⁸ disagreed with Fitz-Herbert, while Hale¹⁹ and

¹⁴ 1 E. HERZFELD, *ZOROASTER AND HIS WORLD* 230 (1947).

¹⁵ FLETA, 382-3 (1647) speaks of the "essoine de ultra mare" and warns that it would be ill advised and wrong for anyone to leave the realm without first obtaining the king's permission. See also, J. BEAMES, *THE WRIT OF NE EXEAT REGNO* 4 (1921), and C. M. Whelan, *Passports and Freedom of Travel: The Conflict of A Right and A Privilege*, 41 GEORGETOWN L.J. 63 at 65-8 (1952).

¹⁶ Britton, Book VI, chapter VII, writing of the 'Essoine de ultra mare' says that 'no great lord or knight of our realm ought to travel forth of it without our license, since by that means the kingdom might be left destitute of able persons . . . ' 2 BRITTON, 349 (1865).

¹⁷ SIR ANTHONY FITZ-HERBERT, *THE NEW NATURA BREVIVM* 204 (1666) stated: "By the Common Law every man may go out of the Realm to Merchandize, or on Pilgrimage, or for other cause he pleaseth, without the King's leave; and he shall not be punished for so doing: . . ."

¹⁸ SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 178 (4th ed. 1669) stated that the 4th Constitution of Clarendon of 1164 ". . . appeareth in it self to be but a recognition, or declaration of the Common Law."

¹⁹ Sir Mathew Hale, *A Treatise in Three Parts, Part 2, De Portibus Maris*, found in F. HAR- GRAVE, *COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* 91 (1787) stated: "At common law any man might pass the seas without license, unless he were prohibited; . . ."

then Blackstone²⁰ found merit in Fitz-Herbert's view of the law. The early legal giants of the common law were divided and deadlocked on the issue.

More recently, the younger Chitty,²¹ writing in 1820, supported the opinion that the King's permission was required while Beames,²² writing a year later, disagreed. In this century, Sibley,²³ an expert on passports who wrote in 1906, supported the view that the common law prohibited the subject leaving the realm without a licence; a view also taken by Holdsworth²⁴ in his examination of the whole of the history of English law. Without disclosure of which camp appears to be right at this juncture, let us discover where the foundation stones of the topic lay.

A search of Anglo-Saxon practices does not reveal any direct attempt by the kings to challenge the individual's freedom to leave the country. However, the Anglo-Saxon law of mutual responsibility, which called for every man to give bail for the good conduct of his neighbours, was effective in restraining the individual's mobility. All political units, such as hundreds and earldoms, had to pay fines for offences committed within their limits. Consequently, no Saxon could have travelled without giving the most substantial reasons to his brother-bondsmen as they continued to be sureties for his behaviour.

The royal challenge to the individual's freedom to leave the country appears to have its genesis in the years following the Norman conquest of England. As the Norman Church lay firmly under the control of the Norman dukes,²⁵ it is not surprising to find William the Conqueror asserting a similar authority over the English Church. In ecclesiastical matters, William proposed to maintain the English Church as a national, self-governing institution amenable to his temporal power. William, however, was to find a challenger to his control over the English Church in the person of the Pope. The concept of a centralized church regulated in all aspects by the Pope was untenable to the Conqueror, who regarded such a policy as contrary to his tradition and an attempt to encroach upon his secular authority. William envisaged himself as an absolute monarch

²⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 265 (1765) stated: "By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the King's leave; provided he is under no injunction of staying at home . . ."

²¹ J. CHITTY THE YOUNGER, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN 21 (1820) states: "The King's right to keep his subjects within the realm, which exists at common law, . . ."

²² J. BEAMES, THE WRIT OF NE EXEAT REGNO 1 (1821) speaking of the writ stated that "It appears to have been unknown to the ancient Common Law, which in the freedom of its spirit, allowed everyman to depart the Realm at his pleasure."

²³ N. W. Sibley, *The Passport System*, 7 J. COMP. LEG. & INT'L L., N.S. 26 at 32 (1906). This was the view taken as recently as 1946, see K. Diplock, *Passports and Protection in International Law*, 32 TRANSACT. GROT. SOC. 44 (1947).

²⁴ 10 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 390 (1903-38) stated "At common law the King had certain powers to control the movements of his subjects."

²⁵ C. H. HASKINS, NORMAN INSTITUTIONS 30 (1925).

which included his mastership over all clerics in his dominions. Recognition of the papal headship of the Church was acceptable as long as papal contact with the English Church did not seek to challenge or restrict the King's authority over his subjects. William's concern proved to be well-founded as Pope Gregory VII was to call for the exemption of the English Church from secular administration and the subjection of the King to the power of the Roman See.²⁶ As the Roman Church sought to extend its influence and power, the hitherto peaceful harmony which prevailed between Church and State prior to the conquest was destined to erupt into a clash between the King and Pope.

It is to the king's line of action for the containment of the Roman influence that we are directed.²⁷ Without reference to former law or custom, William innovated a series of edicts designed to accomplish his purpose.²⁸ Among the new laws were to be found the restrictions that (a) no appeals to the Papal Court were allowed without the king's permission save in matrimonial and testamentary matters;²⁹ (b) no papal legate *a latere* was to set foot in England without first obtaining the king's licence, and providing security or taking an oath not to do anything against the king's will;³⁰ (c) no papal bull, constitution or letter could be received or brought into England unless it was approved by the king;³¹ (d) no pope was to be recognized in England without the king's consent;³² and (e) no ecclesiastic was to leave England without the king's permission, as well as other restrictions.³³ In time these *leges* of the Conqueror were to become known as the *avitae consuetudines* or the ancestral customs. It is this last specific restriction with which we are most concerned, but in some instances, it will be necessary to focus on the question of appeals, (a) above, which bears a special relationship to the limitation on travel.

²⁶ 4 E. A. FREEMAN, *HISTORY OF THE NORMAN CONQUEST OF ENGLAND* 432-3 (1867). For a full discussion on this question see Z. N. BROOKE, *THE ENGLISH CHURCH AND THE PAPACY* 132 (1931) and A. J. MACDONALD, *LANFRANC: A STUDY OF HIS LIFE, WORK AND WRITING* 220-31 (1926). See also Pope Gregory VII's letter to William dated May 8, 1080 in which he makes a formal demand for William's fealty, found in 2 D. C. DOUGLAS & G. W. GREENAWAY, *ENGLISH HISTORICAL DOCUMENTS* 1042-1189, 646 (1953).

²⁷ 1 EADMERI *HISTORIA NOVORUM IN ANGLIA* 10 (M. Rule ed. 1884) [hereinafter referred to as EADMER]; G. BOSANQUET, *EADMER'S HISTORY OF RECENT EVENTS IN ENGLAND* 10-11 (1964).

²⁸ F. BARLOW, *THE FEUDAL KINGDOM OF ENGLAND* 1042-1216 131 (1955).

²⁹ For an excellent discussion of this restriction see F. MAKOWER, *THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND* 225-232 (1895). See also T. B. INGRAM, *ENGLAND AND ROME* 24-47 (1892); H. G. RICHARDSON & G. O. SAYLES, *THE GOVERNANCE OF MEDIEVAL ENGLAND FROM THE CONQUEST TO MAGNA CARTA* 295-302 (1963), 3 W. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 348 (1874-78) [hereinafter cited as CONST. HIST.].

³⁰ F. MAKOWER, *supra* note 29, at 232-35; T. B. INGRAM, *supra* note 29, at 15-24; 3 W. STUBBS, *CONST. HIST.*, *supra* note 29, at 298-301.

³¹ F. MAKOWER, *supra* note 29, at 235-39.

³² J. T. ELLIS, *ANTI-PAPAL LEGISLATION IN MEDIEVAL ENGLAND* (1066-1377) 9 (1930).

³³ 1 W. STUBBS, *CONST. HIST.*, *supra* note 29, at 285-6.

As the actual edict of William, which called for the king's licence before an ecclesiastic could journey beyond the seas, is lost in the mist of time, it becomes necessary to prove the case of its existence by sifting the evidence provided by the Conqueror's actions. William's actual enforcement of this restriction is attested to by several church historians.³⁴ The initial exercise of the prerequisite to leaving the country is deemed to have taken place in 1071 when William granted his permission to Lanfranc, the Archbishop of Canterbury, and Thomas, the Archbishop of York, to proceed to the Apostolic See to receive their pallia from the Pope. Prior to the conquest, the Anglo-Saxon kings allowed an archbishop to travel to Rome from the pallium without the necessity of either seeking or obtaining special leave of the king.³⁵ The king's licence or passport was probably contained in a document sealed under the Great Seal in a form similar to what subsequently became the *licentia transfretandi*.³⁶

In a letter addressed to Archbishop Lanfranc, dated 25 March 1079, Pope Gregory VII ventured a guess as to the Archbishop's failure to visit Rome. He wrote, "Verily, as we have ascertained from a reliable source, your presence has been denied to us . . . through fear of the king . . . (who) has taken this measure against the holy see. . ." and Lanfranc was directed to "counsel him not to presume unjustly against the Roman Church . . . nor to restrict further you or any other devoutly desiring to visit the apostolic see."³⁷ Not long afterwards, in a letter addressed to Hubert, subdeacon of the Roman Church, dated 23 September 1079, Pope Gregory expressed his indignation as to the king's malevolent practice in these words:

For none of all the kings, not excepting those that are heathen, has dared to act against the apostolic see in the way he has unblushingly done; none has been so irreverent or shameless as to forbid the bishops and archbishops to frequent the threshold of the apostles.³⁸

One view which seeks to explain the remarks in these letters is offered by the church historian, Waterworth.³⁹ He suggests that these letters were written by the pontiff after William had ignored repeated solicitations by Lanfranc for the king's licence to journey to Rome. I would add that the

³⁴ N. F. CANTOR, CHURCH, KINGSHIP AND LAY INVESTITURE IN ENGLAND 1089-1135 77 (1958); W. WATERWORTH, ENGLAND AND ROME 253 (1854).

³⁵ G. O. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 194 (1948). Archbishops of Canterbury went to Rome for this purpose as early as 925 while the archbishops of York went from 1026.

³⁶ See, 4 SIR FRANCIS PALGRAVE, THE HISTORY OF NORMANDY AND ENGLAND 106 (1851-65).

³⁷ D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 643. Reference to this letter is also found in W. WATERWORTH, *supra* note 34, at 254; Z. N. BROOKE, *supra* note 26, at 137; 4 E. A. FREEMAN, *supra* note 26, at 435, n. 1 contains the Latin text of the letter.

³⁸ D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 643-4. See also, Z. N. BROOKE, *supra* note 26, at 137.

³⁹ W. WATERWORTH, *supra* note 34, at 253.

reference to *bishops and archbishops* in the second letter is more realistic, as others aside from Lanfranc would be expected to visit Rome.

Following William's receipt of the Pope's letter of 8 May 1080⁴⁰ which calls for William's fealty to Gregory VII, and William's explicit refusal⁴¹ in words which led the historian, Stenton,⁴² to relate "No Statesman has ever settled a major issue in fewer words, or more conclusively," the Conqueror would ensure that stringent measures were maintained to enforce his policies. The directness of the papal ambitions and their utter rejection by William left little chance for relaxation of the Conqueror's policy to limit freedom of access by his bishops to Rome. Witness to this proposition can be shown from Lanfranc's failure to journey to Rome despite a papal command in 1082 which carried with it the threat of suspension from all episcopal function if Lanfranc disobeyed.⁴³

Another rationale which provides for the emergence of travel restrictions upon English prelates has its origin in the events which ensued following the death of Pope Alexander II. Rival popes, Gregory VII and Clement III, emerged as heirs to the throne of St. Peter. William adopted a policy of neutrality in refusing to acknowledge either candidate until he called a Council of the English Church to consider the matter, a move which he unhesitatingly deferred until Gregory's expulsion from his see by Emperor Henry IV in 1080. Until William formally accepted Gregory as the legitimate pope the travel restrictions on English ecclesiastics served to save the king the embarrassment of rendering recognition before he had made up his mind.⁴⁴ Moreover, the deferment of recognition gave William the opportunity to strengthen his ecclesiastical policies. The theory, however, can only account for the development of the restraint on ecclesiastics going beyond the seas from the time of the death of Alexander II in 1073, when pope and anti-pope made their appearance. As has been already noted, both Archbishops Lanfranc and Thomas secured the king's permission before their departure in 1071.

Sir Francis Palgrave supports the view that the impediment to travel in this era did not rest solely upon the English clerics but that the king exercised this prerogative to prevent any of his subjects from leaving the realm.⁴⁵ It must also be remembered that this was an age when feudal ties were strongest. Men and women did not normally leave the domain of the lord without permission. If permission was granted a nominal annual fine of a chicken or two, or the corresponding money equivalent, was paid by

⁴⁰ See note 26, *supra*.

⁴¹ D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 646-7.

⁴² F. M. STENTON, *ANGLO-SAXON ENGLAND* 667 (1943).

⁴³ A translation of the letter from Pope Gregory to Lanfranc is found in D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 648.

⁴⁴ G. SLOCOMBE, *WILLIAM THE CONQUEROR* 230-1 (1959).

⁴⁵ 4 SIR FRANCIS PALGRAVE, *supra* note 36, at 106.

the person to his lord. In addition, he remained in the tithing and for this purpose he had to appear at the annual view of frankpledge in his home manor. Moreover, a pledge had to be found satisfactory to the lord.⁴⁶ Operation of this system in varying degrees of severity stifled almost all travel abroad by the ordinary Englishman. Another factor, not to be overlooked, was the requirement of funds for travel. The cost of travel for the ordinary fellow was prohibitive. He also had to contend with the fact that he was on his own once out of the country and so at the mercy of those whom he encountered which acted as another deterrent to foreign travel. Anglo-Saxon relations also found foreign ecclesiastics regarded with great suspicion by William. Such individuals had to receive William's permission before attempting to enter England as witnessed by Lanfranc's caution to Hugh the Cardinal in 1084, "I do not recommend your coming to England unless you first obtain permission from the king of the English."⁴⁷ Hence, at the close of the Conqueror's reign the practice of forbidding English clergy, if not all English subjects, from departing the realm without the king's licence is firmly entrenched.

Whether you agree or not that the initial appearance of the travel prerequisites occurred in the Conqueror's time, his successor exercised this tether upon his English subjects. Selden⁴⁸ was of the opinion that the development of the restraint against ecclesiastics and other subjects enjoying freedom of travel was attributable to William Rufus, a view also shared by Beames.⁴⁹

An excellent illustration of the complications encountered by an ecclesiastic who desired to depart the realm is brought to light in the *Trial of William of St. Calais, Bishop of Durham*.⁵⁰ Briefly, the bishop, who also happened to be lord of the fief, had been indicted for treason. The bishop requested trial by compurgation which was refused. He asked for leave to appeal to the Papal Curia on the basis that it was a competent tribunal to try a bishop. Leave, in this situation, included the king's authorization in the form of the licence necessary to depart. Rufus responded to the

⁴⁶ See J. A. RAFTIS, *TENURE AND MOBILITY* 139-182 (1964).

⁴⁷ D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 649.

⁴⁸ 2 JOANNIS SELDENI JURISCONSULTI OPERA OMNIA, TAM EDITA QUAM INEDITA 1010 (1726) where he states:

Archiepis copis, episcopis, & personis regni non licet exire regnum absque licencia D.R. & si exierint, si regi placuerit, assecurabunt eum, quod nec in eundo, nec in redeundo, vel moram faciendo, perquirant malum sive damnum D. Regi. Huc referas, an cum Polydoro ad Rufum an posteriora ad tempora rescriptum quod in rescriptum quod in regesto, Ne Exeas Regnum, habetur, haut ita multum interest, nec questionem ac curare pretium erit operae.

⁴⁹ J. BEAMES, *supra* note 22, at 1.

⁵⁰ For a more detailed account see 1 DE INJUSTA VEXATIONE WILLELMI EPISCOPI PRIMI, PER WILLELMUM REGEM FILIUM WILLELMI MAGNI REGIS, IN SYMBONIS MONACHI OPERA OMNIA 170 (T. Arnold ed. 1882); D. C. DOUGLAS & G. W. GREENWAY, *supra* note 26, at 609-24 and authorities cited therein; A. L. POOLE, *FROM DOMESDAY BOOK TO MAGNA CARTA* 1087-1216 (2d ed. 1955).

request with an order to confiscate the bishop's temporalities. The bishop finally left the castle on receipt of a safe-conduct⁵¹ from the king. The castle was then surrendered to the king, and the bishop received a licence to enable him to cross the sea. The licence read:

William, King of the English, to all his liegemen in all England greeting. Know that the bishop of Durham and all his men have my peace throughout the whole kingdom of England, and that they have my permission to cross the sea. Wherefore I forbid all men under my authority to do them harm.⁵²

Noteworthy are the points that the document could be used as a single passport by the bishop named specifically and as a collective passport for the benefit of the bishop and his retinue. Also, that the licence gave royal protection⁵³ for those mentioned therein to be enjoyed whilst in England. Lastly, the licence served to acknowledge the granting of the king's leave for departure from the realm.

I would add that the document described would be of little use to the traveler on reaching foreign soil, as a safe-conduct from the foreign sovereign would be required to assure the traveler some measure of safety. Despite the possession of the licence, the bishop and his retinue were delayed before the king gave his final approval to the departure.⁵⁴

The sanctions to which the subject was exposed for leaving England without the requisite authorization during the reign of William Rufus are aptly demonstrated by the case of Herbert Losinga, Bishop of Norwich. In 1093, the bishop went to Rome to secure papal absolution for his sin of simoniacal purchase of his see. However, he neglected to acquire the necessary licence before embarking upon the trip. Upon Losinga's return, Rufus withdrew the bishop's pastoral staff as punishment for his disobedience.⁵⁵

The death of Lanfranc in 1089 created a vacancy in the archbishopric which remained empty until the election of Anselm on 6 March 1093, when he was both elected and invested as Rufus lay supposedly on his death-bed and was faced with the contingency that he might perish in body and soul

⁵¹ F. BARLOW, *supra* note 28, at 145 contains the reference that the bishops never appeared before the king without a safe-conduct. The document referred to was issued for the safety and protection of the holder during internal travels.

⁵² D. C. DOUGLAS & G. W. GREENWAY, *supra* note 26, at 622. The contemporary writer, Symeon of Durham, in his account stated the licence to be:

Willelmus rex Anglorum omnibus, fidelibus suis per totam Angliam salutem. Sciatis Dunelmensem episcopum et omnes suos homines pacem meam habere per totum regnum Angliae, et licentia et pace mea mare transire: ideoque defendo omnibus meae potestatis hominibus, ne aliquid mali eis faciant.

1 T. ARNOLD, *supra* note 50, at 192.

⁵³ The reference to *protection* here does not mean the immunity from suit as in the *litterae de protectione* which frequently appears in the Patent Rolls.

⁵⁴ 1 T. ARNOLD, *supra* note 50, at 192-4; D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 622-4.

⁵⁵ N. F. CANTOR, *supra* note 34, at 77.

if he died with the see still in his possession.⁵⁶ Thereafter Anselm sought the king's permission to journey abroad that he might receive the pallium without which he lacked the fulfillment of his office and could neither consecrate a bishop nor hold a council.⁵⁷ It was to make this point and secure the king's licence that Anselm went to Rufus at Gillingham in January 1095,⁵⁸ but Anselm's plea fell upon deaf ears. The matter was raised again at a meeting of the *curia regis* in its fullest aspect which opened at Rockingham on 25 February 1095. The *curia regis* failed to settle the issue and Anselm again requested the king's permission to leave the realm, but without success.⁵⁹ The pallium was subsequently brought to England by the papal legate, Cardinal Walter of Albano.⁶⁰

Anselm was already conversant with the practice of obtaining the king's licence to leave England before the issue over the pallium arose. He had arrived in England on 7 September 1092 as a visitor at the invitation of Earl Hugh of Chester. After staying a time, Anselm asked for the king's permission to leave the realm in order to return to Normandy but Rufus, without giving any reason refused to issue the passport and Anselm was compelled to follow the royal court.⁶¹

As Anselm promised to observe the "*avitae consuetudines*" in 1095⁶² this could only mean that he acknowledged the right of Rufus to enforce the *leges* of the Conqueror. Here I would hasten to add that Selden probably viewed the emergence of the restraint on foreign travel by ecclesiastics during Rufus' reign in connection with the question of papal recognition.⁶³

⁵⁶ EADMER, *supra* note 27, at 30-31; N. F. CANTOR, *supra* note 34, at 53. A translation is to be found in D. C. DOUGLAS & G. W. GREENAWAY, *supra* note 26, at 650-73. Anselm did homage to Rufus in September and was consecrated 4 December 1093.

⁵⁷ R. W. SOUTHERN, *Saint Anselm And His Biographer* 154 (1963); A. L. POOLE, *supra* note 50, at 173-4. Unless the pallium were obtained within a year of consecration, Anselm could be deprived of his archbishopric.

⁵⁸ Rufus was against Anselm's journey to receive the pallium because the king had not yet recognized Clement III or Urban II as Pope following the death of Gregory VII, while still in exile in 1085.

⁵⁹ R. W. SOUTHERN, *THE LIFE OF ST. ANSELM BY EADMER* 87 (1962). The meeting of the *curia regis* at Rockingham was to consider the primary question of recognition of the pope which would influence the decision by the king to allow Anselm to depart.

⁶⁰ *Id.* at 87. Anselm received the pallium at Canterbury on 27 May 1095 but without meeting the legate, *Id.* at 87, n. 2; A. L. POOLE, *supra* note 50, at 175; 4 SIR FRANCIS PALGRAVE, *supra* note 36, at 206-07; R. W. SOUTHERN, *supra* note 57, at 131.

⁶¹ 4 SIR FRANCIS PALGRAVE, *supra* note 36, at 107; 1 E. A. FREEMAN, *The Reign of William Rufus* 388 (1882). In EADMER, *supra* note 27, at 29 we find: "*Post haec in Normanniam regredi volens, negata a rege licentia copiam id agendi habere non potuit.*" No doubt Anselm was well aware of the restrictions on everyone wishing to leave the realm and had to meet the situation from the time of his initial visit in 1079 and his numerous subsequent visits, R. W. SOUTHERN, *THE LIFE OF ST. ANSELM BY EADMER*, *supra* note 59, at 57; 4 SIR FRANCIS PALGRAVE, *supra* note 36 at 106-7. It also seems reasonable to conclude that he would not leave England without first obtaining the prior permission as he was aware of the treatment of Herbert Losinga, N. F. CANTOR, *supra* note 34, at 77, n. 169.

⁶² F. MAKOWER, *supra* note 29, at 22, n. 41 where he cites EADMER, *supra* note 27, at 84.

⁶³ Selden relates:

By 1097, Anselm could no longer tolerate the king's obvious spoliation of Church property over the issue of knight service, or the degeneration of religious discipline and endeavoured to seek authoritative advice in Rome. On three occasions Anselm requested the king's permission to make the journey abroad. On the third occasion his persistence met with success and the licence was issued in October 1097.⁶⁴ Anselm recognized the right of the king to exercise his prerogative, for on the occasion of the second refusal, he said: "He has the power: he says what he pleases. But if he refuses now, perhaps he will agree at another time. I shall keep on asking."⁶⁵

At the time of Anselm's third request, the king answered⁶⁶ in a manner which cast little doubt as to the measures that would follow if the Archbishop left without his licence as Anselm had indicated that he might leave the realm without the king's permission. Faced with the realization of Anselm's possible course of action, the king offered the aged Archbishop a choice of either taking an oath never to appeal to Rome or to depart from England as quickly as possible and take nothing with him without the king's permission.⁶⁷ Such was the king's reluctance to allow freedom of access to Rome. Anselm chose to leave, and despite the issuance of the licence, the actual departure was delayed until a thorough search was completed, lest the king be deprived of any riches.⁶⁸ The decision to travel meant exile for Anselm as well as confiscation of the church lands under his aegis. His exile lasted until September 1100 when he returned at the invitation of a new sovereign, Henry I.

The return of Anselm to England did not mean a change in the application of the law or easing of the restriction on travel as shown by Henry's letter of October 1101 to Pope Paschal II.⁶⁹ Following the death of An-

Publico . . . edicto vetuit unumquemque sive commeatu suo ex Anglia egredi. Veluisse Anselmum, ne Urbanum PP. inviseret legimus; universos hoc complexum edicto, quam apud Polydorum, legendo me comperisse dissiteor, Joannis Seldeni Jurisconsulti Opera Omnia, Tam Edita quam Inedita.

Supra note 48, at 1005.

⁶⁴ R. W. SOUTHERN, *THE LIFE OF ST. ANSELM BY EADMER*, *supra* note 59, at 91-2, and references contained in the footnotes. See also, G. BOSANQUET, *supra* note 27, at 83-90; G. O. SAYLES, *supra* note 35, at 267. Some authorities felt that Anselm departed the realm without the permission, see A. L. POOLE, *supra* note 50, at 176. The explanation for this occurrence is found in R. W. SOUTHERN, *THE LIFE OF ST. ANSELM BY EADMER*, *supra* note 59, at 91, n. 2.

⁶⁵ R. W. SOUTHERN, *SAINT ANSELM AND HIS BIOGRAPHER*, *supra* note 57, at 160.

⁶⁶ Rufus said, "As for his reasons I refuse to listen to them. But if he goes, he can be sure that I shall take back the whole of the archbishopric into my own hands and will never again receive him as Archbishop," BOSANQUET, *supra* note 27, at 84. See also, T. B. INGRAM, *supra* note 29, at 31.

⁶⁷ R. W. SOUTHERN, *THE LIFE OF ST. ANSELM BY EADMER*, *supra* note 59, at 92.

⁶⁸ *Id.* at 98; EADMER, *supra* note 27, at 88. See also, G. BOSANQUET, *supra* note 27, at 87, 91.

⁶⁹ The letter read in part: "That he had hoped the Pope would send the pallium to Gerard, Archbishop of York, without insisting on a personal visit from the archbishop . . .," contained in *Regesta Regum Anglo-Normannorum 1066-1154*, II REGESTA HENRICI PRIMI 1100-1135 15 (1956) [hereinafter cited as REGESTA].

selm in 1109 the see was left vacant by the thrifty king until 1114, and a virtual breach with the papacy prevailed as no appeals went to Rome. On the death of Thomas, Archbishop of York, Henry filled the vacancy by elevating Thurstan. Subsequent to Thurstan's election, Ralph d'Escures, the Archbishop of Canterbury, summoned him to Canterbury to be consecrated. Thurstan wished to avoid this profession of obedience and proceeded instead to Rouen, where the king resided at the time, to request his permission for a journey to Rome where he might submit the question of profession to the Pope. Henry refused to issue his licence.⁷⁰

At this juncture, I call attention to *Quadripartitus*, a law book written about 1114, which lends its authority to the proposition that the restraint upon individuals in England to secure the king's licence before departure did not merely encompass ecclesiastics as a class but applied to all persons.⁷¹

In 1115, Thurstan again applied for the king's permission so that he might proceed to Rome, but met with the same negative response.⁷² Thurstan renewed his request in 1116 just after Easter but to no avail although Henry promised to let him go in the future.⁷³ At a later date Thurstan donning a disguise stole out of England from Dover⁷⁴ and crossed to Normandy where he found Henry and requested permission to visit the Pope who was then at Tours. Henry refused.⁷⁵ At about this time the Archbishop of Canterbury applied for a passport to travel abroad for a visit with Pope Calixtus II and we learn that Henry gave his leave without reluctance.⁷⁶ It was at the king's whim whether an individual would receive the required permission to leave the realm. The legal impediments to travel in this age are demonstrated by the fact that despite Archbishop Ralph's licence from Henry, the Archbishop could not obtain the necessary safe-conducts from the French king and the Count of Anjou to cross their territories. Thurstan, on the other hand, was respected by the French

⁷⁰ 2 THE HISTORIANS OF THE CHURCH OF YORK AND ITS ARCHBISHOPS BY HUGH THE CHANTOR 131 (J. Raine ed. 1886).

⁷¹ *Regem Anglie singulari majestate regni sui dominum esse, manifeste veritatis intuitus et singulorum denique. cognovit effectus. Quod cum inclita bonitate regis et iure debita subditorum fidelitate proveniat, situs quoque patrie confidenter adjuvat, nature beneficiis et maris vicinitate conclusus, ut sine gratuita dominorum licentia nulul exitus, nulli relinquatur ingressus.*

2 QUADRIPARTITUS 176 (F. Liebermann ed. 1892).

⁷² 2 J. RAINE, *supra* note 70, at 133; C. JOHNSON, HUGH THE CHANTOR 38-9 (1961).

⁷³ 2 J. RAINE, *supra* note 70, at 143, 145; C. JOHNSON, *supra* note 72, at 49, 51-2. The ban on ecclesiastics travelling to Rome was not absolute as the Archbishop of Canterbury was to go in 1117, accompanied by Herbert, Bishop of Norwich, Hugh, Abbot of Chertsey, a physician, and William of Corbeuil, Canon of Canterbury.

⁷⁴ 2 J. RAINE, *supra* note 70, at 150; C. JOHNSON, *supra* note 72, at 57. It seems that no reprimand followed.

⁷⁵ 2 J. RAINE, *supra* note 70, at 154; C. JOHNSON, *supra* note 72, at 61.

⁷⁶ 2 J. RAINE, *supra* note 70, at 155; C. JOHNSON, *supra* note 72, at 62.

king and the Count of Anjou and could secure the safe-conducts, but lacked Henry's passport.⁷⁷

As Pope Calixtus was cognizant of the English restrictions on travel, he wrote to Henry to inform him that a General Council was being planned to be held at Rheims and called upon Henry to grant both archbishops his licence to attend and also to extend to either of the archbishops a licence to visit with him prior to the Council.⁷⁸ We also know that when Pope Calixtus II met Henry at Gisors in 1119 following the Council, Henry confirmed the Conqueror's *leges*.⁷⁹ This confirmation before the Pope is not really surprising as Henry had previously made a unilateral declaration of his position in more general terms in a letter addressed to Pope Paschal II written during January 1101, and the papal acceptance merely represented an act of diplomacy. In the aforementioned letter, Henry "promises the same obedience to the Pope as rendered in his father's time; provided that he is allowed to have the same customs which his father had. But he will not let the dignities and customs of the realm of England be impaired."⁸⁰

During the reign of Stephen, the papacy used the inherent weaknesses of the monarch and the secular government to further the interests of Rome. Nevertheless, Stephen, like his predecessors, exercised his prerogative to restrict travel without licence. He allowed only five English prelates to attend the Second Lateran Council held in 1139.⁸¹ The consequences of illicit travel were obviously known by the magnates of the realm and others for when the bishops proposed to send some of their number to Rome to complain of the treatment of John of Salisbury in 1139, Aubrey de Vere warned them that "if anyone went anywhere out of England contrary to his wish (the king) and the majesty of the Crown it might be difficult for him to return."⁸²

We also know that Pope Eugenius III summoned a Council at Rheims in 1148, and Stephen refused to allow Theobald, Archbishop of Canterbury, to attend. However, Stephen gave permission for three bishops to

⁷⁷ 2 J. RAINE, *supra* note 70, at 157-58; C. JOHNSON, *supra* note 72, at 65.

⁷⁸ 2 J. RAINE, *supra* note 70, at 159; C. JOHNSON, *supra* note 72, at 66. Henry finally gave Thurstan a licence to leave England; 2 J. RAINE, *supra* note 70, at 161; C. JOHNSON, *supra* note 72, at 69.

⁷⁹ 4 ORDERICUS VITALIS HISTORIAE ECCLESIASTICAE 373 (1838-85). F. BARLOW, *supra* note 28, at 185 takes the position that it was the Pope who was persuaded to confirm the customs of the Conqueror, a view which I submit goes too far.

⁸⁰ 2 REGESTA, *supra* note 69, at 6-7. The reply of Pope Paschal to Henry is found in EADMER, *supra* note 27, at 128-31. For a brief description of the physical problems of travel in that day painted in colorful tones see 2 J. RAINE, *supra* note 70, at 212; C. JOHNSON, *supra* note 72, at 123-4.

⁸¹ 3 CHRONICLES OF THE REIGNS OF STEPHEN, HENRY II AND RICHARD I 176-7 (R. Howlett ed. 1886). See also, the notes of R. L. Poole & W. Hunt in 38 ENG. HIST. REV. 61-3, 557-60 (1923), as to the English bishops who actually attended. Prior to the Norman Conquest, English bishops were able to attend papal councils overseas without the king's licence, G. O. SAYLES, *supra* note 35, at 194.

⁸² THE HISTORIA NOVELLA BY WILLIAM OF MALMESBURY 33 (K. R. Potter trans., 1955). See also, RICHARDSON & SAYLES, *supra* note 29, at 297-8.

attend in order to excuse the absence of Theobald and other ecclesiastics whose attendance was anticipated. In addition to the refusal to Theobald, Stephen took the additional precaution of having the seaports watched to prevent the Archbishop from leaving the country illegally. Despite the alert, Theobald stole out of the country in a fishing vessel and attended the Council,⁸³ a move which ultimately resulted in the Archbishop's exile and deprivation of temporalities.⁸⁴

One hypothesis for the development of the practice of having English agents more or less permanently resident in Rome to act as counsel at the Papal Curia on behalf of English bishops, abbots and others, hinges upon the obvious difficulty the subject had in leaving the realm. John of Salisbury acted for a time in this capacity and represented Theobald before Pope Eugenius III in the Archbishop's dispute with the monks of St. Augustine who were similarly represented.⁸⁵

During the Norman line of kings, we have witnessed the establishment and exercise of a practice which originated either in the time of William the Conqueror or William Rufus depending upon which authorities one follows. The question now to be faced is whether the application of the principle which prevented individuals departing from England without the king's permission was a principle belonging to the common law.

As the restraint on travel was not of Anglo-Saxon vintage, its appearance under the Norman kingship meant that it could not have been part of the English customs or *consuetudines* but rather it belonged to the classification of king's legislation or *leges*. Here I call upon the authority of Professor Hazeltine, who informs us that "the fundamental English distinction in the middle ages is not between the 'unwritten' and the 'written laws,' but between the customs and the king's enactments, between 'customs' and 'laws'; and, at least until the statutes of the king in parliament acquire a position of prominence in relation to common law, neither customs nor the various forms of royal legislation are viewed as 'written law.'"⁸⁶

The application of the Roman jurisprudential dichotomy of law being either *ius scriptum* or *ius non scriptum* would be as inappropriate as the modern division of common law and statute law to determine whether the

⁸³ Robert, bishop of Hereford; William, bishop of Norwich and Hilary, bishop of Chichester. Actually other English subjects made the journey as well as the official representatives. Theobald received permission from Stephen to send members of his household to excuse his absence. These persons stayed with the Archbishop during his subsequent exile, A. SALTMAN, *THEOBALD, ARCHBISHOP OF CANTERBURY* 25 (1956). Also, he sent some of his clerks to apologise for Theobald's absence, M. CHIBNALL, *THE HISTORIA PONTIFICALIS OF JOHN OF SALISBURY* 7 (1956).

⁸⁴ 1 *THE HISTORICAL WORKS OF GERVASE OF CANTERBURY* 134 (W. Stubbs ed. 1879-80). A. SALTMAN, *supra* note 83, at 25-30; CHIBNALL, *supra* note 83, at 6-7.

⁸⁵ 1 W. STUBBS, *supra* note 84, at 135.

⁸⁶ H. G. RICHARDSON & G. O. SAYLES, *supra* note 29, at 298 and references contained therein.

king's enactment was part of the common law during the English middle ages. This pertinent piece of the king's legislation, administrative in character, could have been based upon custom in the middle ages sense while being mindful of the words of Professor Plucknett that "we must recognize the possibility that much of the common law may be ultimately of legislative origin," and that this legislation could very well have been "completely dissolved in the swift-moving stream of the common law . . ." ⁸⁷ by this date. But this argument will not find favour with those who view the common law as dating from the time of Henry II⁸⁸ or some later date.⁸⁹

III

The death of Pope Adrian IV in September 1159 was followed by the recurrent appearance of pope and anti-pope, Alexander III and Victor IV. King Henry II chose to follow a policy of neutrality until he was ready to formally recognize the supremacy of one of the rivals. In furtherance of this policy, Henry forbade appeals to proceed abroad and precluded his clergy from leaving the realm for a purpose which might force him to make a premature decision on recognition.⁹⁰ Henry's official acknowledgement of Alexander III removed the ban on appeals⁹¹ and presumably the travel restrictions were lifted.

On the death of Archbishop Theobald, Henry saw his opportunity to curb the papal influence in England by naming Becket to the seat of St. Augustine. Henry demonstrated to the papacy that a change was to occur, when he enjoined Becket from journeying abroad to receive the pallium.⁹²

When the Pope's Council was held at Tours in May 1163, the Archbishops of Canterbury and York, Becket and Roger, were in the English delegation.⁹³ However, according to Rymer, Henry gave his licence to the

⁸⁷ H. D. Hazeltine, *The Interpretation Of Law By English Medieval Courts* written as the General Preface in T. F. T. PLUCKNETT, *STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY* (1922).

⁸⁸ T. F. T. PLUCKNETT, *LEGISLATION OF EDWARD I* 8-9 (1949).

⁸⁹ Bishop Stubbs in his historical study of law said: "The history of Norman law is . . . in a debatable land between Anglo-Saxon law . . . and the common law of England, which dates its historical shaping from the reign of Henry II," *The Laws and Legislation of the Norman Kings*, in *LECTURES ON EARLY ENGLISH HISTORY* BY WILLIAM STUBBS 38 (A. Hassall, ed. 1906).

⁹⁰ For a discussion on this point see, 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 168 (2d ed. 1911).

⁹¹ H. G. RICHARDSON & G. O. SAYLES, *supra* note 29, at 297 and references contained therein. The authors point out that Henry must have addressed writs to the Clergy to state his position and was obeyed "because disobedience, if brought to light, might have unpleasant consequences." This policy by Henry gave an early indication of his desire to return to the so-called *avistae consuetudines* of the Normans. See A. SALTMAN, *supra* note 83, at 543 and the same author's comments in 22 *INST. OF HIST. RESEAR. BULL.* 154 (1949).

⁹² See P. M. Barnes, *The Anstey Case*, in 36 *A MEDIEVAL MISCELLANY FOR DORIS MARY STENTON* (P. M. Barnes & C. F. Slade ed. 1962).

⁹³ 1 RADULFI DE DICETO DECANI LUDONIENSIS OPERA HISTORICA 307 (W. Stubbs, ed. 1876). John of Salisbury and four other commissioners were dispatched in July 1162 to collect the pallium from the pope at Montpellier, C. C. J. WEBB, *JOHN OF SALISBURY* 104 (1932).

English delegates authorizing their attendance at the Council after receiving an assurance from the Pope that the decision would not be regarded as a precedent.⁹⁴ Henry used the issue of jurisdiction over criminous ecclesiastical clerks to press acceptance of his policies.⁹⁵ He summoned a Great Council to meet at Clarendon in January 1164 at which time Becket and the bishops present gave their assent to observe the *avita consuetudines* in general terms. However, Henry, sought to have these customs concerning ecclesiastical matters, which were operative in his grandfather's day, reduced to writing. A committee of Barons carried out the assignment; the resultant document being the Constitutions of Clarendon. The preamble to the Constitutions signified that these were customs and rights of the kingdom at the time of the king's ancestors, which I suggest, were to continue unless expressly withdrawn. The fourth clause of the Constitutions gave notice of the restriction on freedom of exit of all his subjects in these words:

Archbishops, bishops and persons of the realm are not allowed to leave the kingdom without licence of the lord the king; and if they do leave, they shall, if the king so please, give security that neither in going nor in staying, nor in returning, will they seek the ill or damage of the lord or realm.⁹⁶

Clause 8⁹⁷ must be read in conjunction with clause 4 to fully appreciate Henry's efforts to restrict freedom of movement of the English clergy to Rome.

The reference to *avita consuetudines*, I submit, was Henry's attempt to give historical justification for the laws. Becket subsequently excommunicated the authors of the Constitutions, who were primarily Richard de Luci and Joceline de Bailloil for "fabricating the heretical customs."⁹⁸

Henry had been determined to come to grips with the papal influence

⁹⁴ *Id.* at 310.

⁹⁵ FOEDERA, CONVENTIONES, LITTERAE, ET CUIUSCUNQUE GENERIS ACTA PUBLICA INTER REGES ANGLIAE ET ALIOS QUOSVIS IMPERATORES, REGES, PONTIFICES PRINCIPES, VEL COMMUNITATES, 1049-1383 44 (T. Rymer, ed 1816-1869) [hereafter cited as FOEDERA], cited by C. R. CHENEY, FROM BECKET TO LANGTON 92 (1956).

⁹⁶ See, C. Duggan, *The Becket Dispute and the Criminous Clerks*, 35 INST. HIST. RES. BULL. 1-28 (1962), and authorities cited. Duggan supports the view that the issue over clerical immunity was of lesser importance than "the everwidening jurisdiction of papal judges delegate, freedom of appeal from the English ecclesiastical courts to the papal Curia; the passage of bishops and papal legates between the island and the continent" *Id.* at 2.

⁹⁷ G. B. ADAMS & H. M. STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 12-13 (1920). The Latin text can be found in W. STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 165 (9th ed. 1913). The full Latin text of the Constitutions can also be found in William of Canterbury's biography of Becket, the chronicles of Gervase of Canterbury, Roger of Wendover and Matthew Paris.

⁹⁸ In regard to appeals, if they shall occur, they must proceed from the archdeacon to the bishop, and from the bishop to the archbishop. And if the archbishop fail in showing justice, they must come at last to the lord the king, that by his command the dispute be concluded in the archbishop's court, so that it must not go further without the assent of the lord the king.

G. B. ADAMS & H. M. STEPHENS, *supra* note 97, at 12-13. Latin text in W. STUBBS, SELECT CHARTERS, *supra* note 97, at 165.

which hindered his grand design of reform. He was aware of the practices of the past. Why not use the methods employed by his predecessors and ascribe to them the title of ancestral customs now to be a substantive rule of law? But the Constitutions were in their own right, rather than as the *avite consuetudines*, able to become part of the common law.

We know that on the issue of appeals to Rome, Henry did not seek their abolition but merely wished to eliminate abuses which had crept into the practice while such a move would also safeguard his own interests as temporal lord.⁹⁹

For the usage of the fourth constitution, we must return to the course of events which followed the King's enactment of the Constitutions. Under pressure Becket consented to the Constitutions,¹⁰⁰ then requested the king's permission to leave the realm in order to visit the Pontiff. On Henry's refusal, Becket twice attempted to leave England without the king's licence which was, of course, contrary to what he had sworn.¹⁰¹ The Council of Northampton was held in October 1164, after which Becket sent bishop Walter of Rochester, bishop Robert of Hereford and bishop Roger of Worcester to Henry in quest of a licence, but the king procrastinated by refusing to give an answer. In this inauspicious atmosphere the Archbishop went into hiding and stole out of England on All Soul's Day, 2 November 1164.¹⁰²

It will be remembered that Henry sent the Constitutions to Pope Alexander III with a request for his concurrence, but the Pontiff disallowed ten of the sixteen constitutions as being contradictory to the canons,¹⁰³ an act which created little impression upon Henry. Henry applied the fourth Constitution when he thought fit and his subjects obeyed such as the Archdeacon of Canterbury, Geoffrey Ridel, who on 24 June 1166, would not cross to Normandy without the king's licence.¹⁰⁴ The responsibility for supervising exits of ecclesiastics was in the hands of the judges and Henry periodically reminded his subjects of the law as in his ordinance of 1169, lest his subjects think that the practice was inoperative: "*Item nullus clericus, vel monachus, vel conversus alicujus religionis, permittatur transfretare, vel redire in Angliam, nisi de transfretatione habeat litteras justiciarum,*

⁹⁹ R. W. EYTON, COURT, HOUSEHOLD AND ITINERARY OF KING HENRY II 94-5 (1878).

¹⁰⁰ C. R. CHENEY, *supra* note 95, at 89 and authorities cited therein; *see also* 6 MATERIALS FOR THE HISTORY OF THOMAS BECKET 79 (J. Robertson and J. Sheppard ed. 1875-85). [hereafter cited as MATERIALS].

¹⁰¹ F. MAKOWER, *supra* note 29, at 22 and authorities cited therein; *see also*, J. T. APPLEBY, HENRY II 92 *et seq* (1962).

¹⁰² 3 MATERIALS, *supra* note 100, at 293. On the first abortive attempt contrary winds prevented departure while on the second Becket was recognized and had to withdraw for fear of reprisal, J. T. APPLEBY, *supra* note 101, at 98.

¹⁰³ W. H. HUTTON, THOMAS BECKET 115 (1926).

¹⁰⁴ F. MAKOWER, *supra* note 29, at 23. Henry's representatives and Becket met the Pope at Sens. The constitutions disallowed by the Pope were 1, 3, 4, 5, 7, 8, 9, 10, 12 and 15.

et de reditu litteras regis. Et si aliquis aliter inventus fuerit, capiatur et retineatur."¹⁰⁵

Although Henry and Becket were formally reconciled and the Archbishop returned to England in December 1170, no arrangement was reached on the Constitutions which meant they remained operative.¹⁰⁶ From a letter written by John of Salisbury to John, bishop of Poitiers, shortly after Becket's death, we learn that Henry rigidly enforced the restrictions on freedom of travel so that news from the Apostolic See as to the formal canonization of Becket, could not reach England.¹⁰⁷

The murder of Becket put an additional strain on relations between Henry and the Pope. However, after sporadic negotiations a settlement was reached at Avranches in September 1172 whereby Henry and the Pope were reconciled. Examination of the concordat¹⁰⁸ discloses an absence of direct reference to the Constitutions of Clarendon. The customs as they existed prior to Henry's reign were to remain untouched.¹⁰⁹ Despite the restoration of appeals to the Papal Curia, Henry could demand a security from appellants as a guarantee that they meant no harm to the king or realm prior to issuing them with a licence to leave the realm.¹¹⁰ As the Constitutions were not expressly withdrawn, their application was dependent upon the attitude of the king, who considered it diplomatic at the time to permit ecclesiastical appeals to proceed to Rome. Not until Magna Carta was the fourth Constitution expressly repealed.¹¹¹ To enforce the condition of security from those who wished to leave the realm, a writ was framed which was known as *De securitate invenienda quod se non divertat aliquis versus partes externas sine licentia regis*.¹¹² The writ had two forms; one addressed to the Sheriff or Justice of the Peace of the county in which the clergyman resided, that required the Sheriff to take security

¹⁰⁵ R. W. EYTON, *supra* note 99, at 95.

¹⁰⁶ HOVEDEN I 231 cited by F. MAKOWER, *supra* note 29, at 240 n. 2.

¹⁰⁷ F. MAKOWER, *supra* note 29, at 90.

¹⁰⁸ C. C. J. WEBB, *supra* note 93, at 119.

¹⁰⁹ On Henry's oath at Avranches see 1 RADULFI DE DICETO, *supra* note 93, at 351-2; 1 GERVASE, *supra* note 84, at 238-9. See also M. Cheney, *The Compromise of Avranches of 1172 and the Spread of Canon Law in England*, 56 ENG. HIST. REV. 177-197 (1941) in which the author discusses the practice of appeals proceeding to Rome before and after 1172, and Z. N. Brooke, *The Effect of Becket's Murder on Papal Authority in England*, 2 CAMB. HIST. 213-28 (1928).

¹¹⁰ F. MAKOWER, *supra* note 29, at 240, DOUGLAS & GREENAWAY, *supra* note 26, at 773-4; H. W. C. DAVIS, *ENGLAND UNDER THE NORMANS AND ANGEVINS 1066-1272* 243 (1949). In the Brooke article cited in note 109, *supra*, the author states that "when Henry was reconciled . . . he made two concessions: (1) he renounced those customs that had been introduced in his own time to the harm of the Church; and (2) he allowed appeals to Rome," and concluded that since Henry regarded the Constitutions as being "old" customs the first concession meant very little, at 213. Bishop Stubbs was of the opinion that Henry renounced the Constitutions, 1 W. STUBBS, *CONST. HIST.*, *supra* note 29, at 513.

¹¹¹ 1 GESTA REGIS HENRICI SECUNDI BENEDICTI ABBATIS 32 (W. Stubbs, ed. 1867), [hereafter cited as GESTA REGIS HENRICI II].

¹¹² W. S. McKECHNIE, *MAGNA CARTA* 474 (1905).

from individuals who proposed to leave the realm and not to actually depart without special licence from the king.¹¹³ The second form of the writ¹¹⁴ demonstrated clearly that Henry maintained control of his subjects' exit from the realm. This second form of the writ which is addressed to the layman, does not require security as a prerequisite for departure but is designed to prevent the addressee's leaving without the king's licence.¹¹⁵

Henry continued to exercise his prerogative to preclude unauthorized persons¹¹⁶ from proceeding abroad. He restricted the number of English bishops to attend the Lateran Council in March 1179,¹¹⁷ and applied the "other customs"¹¹⁸ enumerated in the Constitutions.

The truant monarch, Richard I, who succeeded Henry II, left little doubt as to whether he would continue his father's policies. In October 1189, approximately a month after his coronation, the king asserted control over *exceats* and refused Godfrey, the Archbishop elect of York, or his

¹¹³ T. D. INGRAM, *supra* note 29, at 36, n. 1, where he cites 7 T. RYMER, FOEDERA 592 (2d ed. 1727-35).

¹¹⁴ The writ is set out in SIR ANTHONY FITZ-HERBERT, *supra* note 17, ch. 85 and L. BEAMES, *supra* note 22, Appendix I. See also, T. B. INGRAM, *supra* note 29, at 36. It read:

REXVIC, &c. Quia datam est nobis intelligi, quod A. B. Clericus, versus partes externas, ad quamplura nobis et quampluribus de populo nostro praejudicialia et dampnosa ibid'. prosequend', transire proponit: Nos, malitiae suae resistere volentes in hac parte, tibi praecipimus, firmit. Injungentes, quod praed. A.B. coram te corporaliter venire fac', et ipsum ad sufficientes Manuceptores inveniend', qui eum manucatare voluerint, sub certa poena eis per te rationabiliter imponend', pro qua nobis respond. volueris; OR THUS, et ipsum A.B. ad suffickent. securitatem inveniend'. sub poena centum librar. ad opus nost. solvend. vel quilibet eor. sub poena, &c. quod ipse versus aliquas partes externas sine licentia nostra speciali se non divertat, nec quodcumque ibid'. prosequatur aut prosequi vel attemptari facere praesumet, quod in nostro contemptu vel praejudicio aut populi nostri dampn. cedere valeat, nec aliquem aut aliquos ibid' mittet ex hac causa, quovis modo compellas. Et si hoc coram te fac. recusaverit, tunc ipsum A.B. prox. Gaol. nostrae committas, in ead' salvo custodiend', quousque hoc gratis fac. voluerit. Et cum securitat. ill. sic ceperis, nos ende in Cancellar. nostr. sub sigillo tuo distincte et aperte sine dilatione redd. certiores, vel certifies idilare, hoc Breve nobis remittens. Teste, &c.

¹¹⁵ This writ is set out, in S. ANTHONY FITZ-HERBERT, *supra* note 17, ch. 85 and J. BEAMES, *supra* note 22, Appendix 2. See also, T. B. INGRAM, *supra* note 29, p. 36. The writ read as follows:

REXI. de B. salutem. Quia datum est nobis intelligi, quod tu versus partes externas absque Licentia nostra clam destinas te divertere, et quamplura nobis et Coronae nostrae praejudicialia ibidem prosequi intendis, in nostri contemptum et praejudicium, ac contra proclamationes et inhibitiones nostras inde saepius factas: Nos, huiusmodi contemptus et praejudicio obviare volentes, tibi districte sub periculo quod incumbit prohibemus, ne versus partes externas absque licentia nostra speciali aliquo modo te divertas, nec quicquam ibidem prosequi attemptes, seu attemptari fac', quod in nostrum seu dictae Coronae nostrae praejudic' cedere valeat quovis modo, nec aliquem ibidem mittas et hac causa. Teste, &c.

¹¹⁶ J. BEAMES, *supra* note 22, at 9.

¹¹⁷ "Randulfus filius Walteri reddit compotum de xx marcis, quia exivit de terra Domini Regis," W. S. McKechnie, *supra* note 112, at 474, n. 1.

¹¹⁸ Henry allowed only the bishops of Durham, Norwich, Hereford and Bath to attend; to whom same include the bishop of Worcester, R. W. EYTON, *supra* note 99, at 225. See also C. R. CHENEY, *supra* note 95, at 92. The restriction on the number of bishops did not affect the number of English abbots who could attend 2 CHRONICA MAGISTRI ROGERI DE HOUEDENE, 171 (W. Stubbs ed. 1868-71).

clerks, licence to journey to Rome for the pallium.¹¹⁹ The king was even more reluctant to issue the licence if the individual making the request could not be adequately protected abroad, as the traveller exposed himself to arrest or capture for ransom, a practice most prevalent during the time of war.¹²⁰

I digress from the main theme to comment on some salient points relating to the king's licence in this age. King John received his new Great Seal on 7 June 1199, and promptly used the Seal to give authority to a law which revised the scale of fees charged during Richard's reign by Chancery for preparation and sealing of *litterae protectionis patentes*. Henceforth, a simple protection was to be issued for the reduced fee of 2 shillings. As the simple protection, the safe-conduct and the licence or passport were sister documents, the fee for such licence to leave the realm was henceforth 2 shillings.¹²¹ The formula in the licence probably became standardized during this period. We know that John issued a safe-conduct on 9 September 1208, to the Archbishop of Canterbury, Stephen Langton, to come to England. Langton, however, refused to embark on the journey as the safe-conduct carried only the small seal instead of the Great Seal.¹²² The close affinity of this document to the licence suggests that the latter document also had an approved form. The style of the licence used by John appears thus:

John, by the grace of God, King & etc., to all his faithful subjects. Know ye, that we have given licence to Sampson, the bearer of these presents, to go to Nantes and there to purchase lampreys for the use of the Countess of Blois. These letters are to be valid for one journey only and no more. Witness ourself at Baugé, on the 12th day of January, in the 3rd year of our reign.¹²³

¹¹⁹ For example, Cardinal Vivian the papal legate appointed to visit Scotland, Ireland and Norway was met upon his arrival in England by two bishops dispatched by Henry, who demanded to know by what authority he landed without the king's licence. Only upon taking an oath not to do anything contrary to the king's will or pleasure during his legation was he allowed to cross the country, R. W. EYTON, *supra* note 99, at 205; F. MAKOWER, *supra* note 29, at 234; W.R.W. STEPHENS, *THE ENGLISH CHURCH FROM THE NORMAN CONQUEST TO THE ACCESSION OF EDWARD I, 1066-1272* 191 (1909).

¹²⁰ "Eodem mense idem Gaufridus Eboracensis electus misit Adam de Thornovere canonicum Eboracensem et alios nuncios quamplures ad Romanum pontificem propter pallium; sed rex voluit permittere eos transfretare, et sic reversi sunt ad dominum suum.", *GESTA REGIS HENRICI II*, at 91-2.

¹²¹ See C. R. CHENEY, *supra* note 95, at 63 and authorities cited therein. Cheney also tells us that Richard applied the "other customs" of the Constitutions such as his refusal to admit papal legates, *id.*

¹²² 1 T. RYMER, *FOEDERA, supra* note 95, at 76; H. G. RICHARDSON, *THE MEMORANDA ROLL FOR THE MICHAELMAS TERM OF THE FIRST YEAR OF THE REIGN OF KING JOHN*, 1199-1200 xxxv-vii (1943); S. PAINTER, *THE REIGN OF KING JOHN* 94 (1949); W. L. WARREN, *KING JOHN* 134 (1961). The reversion to the Henry II fee scale was for the benefit of the magnates, merchants and ecclesiastics, who would use such documents.

¹²³ J. E. A. JOLLIFFE, *Angevin Kingship* 150-51, (2d ed. 1963). Two biographers of King John suggest that Langton did not come to England as the address in the safe-conduct was an affront to his dignity in addressing Langton as cardinal instead of archbishop, S. PAINTER, *supra* note 122, at 177; J. T. APPLEBY, *JOHN, KING OF ENGLAND* 158 (1959). Painter also suggests

It was also necessary for the individual to be assured of receiving the king's licence before letters of protection and attorney would be issued.

IV

Thusfar, the restrictions on travel to be examined have related specifically to ecclesiastics and in general to all subjects of the realm. Another group specifically singled out for restriction were the merchants, otherwise what need would there have been for King John's legislation of 1200 which stated:

John, by the grace of God, King of England, Lord of Ireland, Duke of Normandy and of Aquitaine and Count of Anjou, to the bailiffs of the port of Lynn greetings. Let it be known that we give to Robert son of Sunolf licence to take one ship load of corn into Norway. And therefore we command you that you allow him to take the ships thither without hindrance. And keep these letters in your possession. Witnessed ourself at Westminster, 19th April.¹²⁴

Such legislation was for the benefit of the subject and was distinguishable from the king's charters which gave licence to foreign merchants to enter and leave England.¹²⁵ Although interpretation of chapter 41 of Magna Carta (1215) usually stresses the right in favour of foreign merchants¹²⁶ because the later portion of the chapter obviously pertains to this group, nevertheless the first portion reflects that the chapter is applied to both foreign and native merchants. The wording, "*Omnes mercatores habeant saluum et securum exire de Anglia, et venire in Angliam*,"¹²⁷ as did its antecedent chapter 31 of the Articles of the Barons, "*Quod mercatores habeant saluum ire et venire . . .*,"¹²⁸ demonstrates this point.

What was specifically provided for the merchants in chapter 41 was generally provided for all persons in chapter 42. Chapter 42 read:

that Langton had little faith in John's safe-conduct and sought additional security by way of letters from prominent magnates and ecclesiastics, *supra* note 122, at 230. The safe-conduct read:

The King, to all etc. Be it known that we grant Stephen Langton, a Cardinal of The Roman See, a safe and secure conduct to come to England as far as Dover and to remain there until St. Michael's Day, in the 10th year of our reign, for three weeks. Thus when the three weeks are up within the eight following days let him return, unless a very strong wind detains him. And in witness of this matter we issue this letter patent to him. Witnessed by G. Fitz Peter at Silverstone, The 9th day of September, in the 10th year of our reign.

J. T. APPLEBY, *supra*, at 157-8.

¹²⁴ T. D. HARDY, A DESCRIPTION OF THE PATENT ROLLS IN THE TOWER OF LONDON 65 (1885). Examples of the letters patent formulae for the safe-conduct, protection and internal passage are also contained therein. The formulae used previous to John lacked uniformity.

¹²⁵ ROTULI CHARTARUM, 1199-1216 60 (T. D. Hardy, ed. 1887).

¹²⁶ See the charter of 5 April, 1200, found in ROTULI CHARTARUM, *Id.* at 60; 1 D. MACPHERSON, ANNALS OF COMMERCE 360 (1805).

¹²⁷ W. S. MCKECHNIE, *supra* note 112, at 464.

¹²⁸ W. STUBBS, SELECT CHARTERS, *supra* note 97, at 297-8. The English translation would be, "All merchants shall have safety and security in coming into England and going out of England. . . ."

*Liceat unicuique de cetero exire de regno nostro, et redire, salvo et secure, per terram et per aquam, salva fide nostra, nisi tempore guerrae per aliquod breve tempus, propter communem utilitatem regni, exceptis imprisonmentis et utlagatis secundum legem regni, et gente de terra contra nos guerrina et mercatoribus de quibus fiat sicut praedictum est.*¹²⁹

A few observations follow. First, John's practice of using his licence to restrict travel of merchants, as verified by the converse, his act of 19 April 1200, was probably learned from his father. It is known that Henry II obtained two falcons in 1181, for granting his license to Arnold, son of Mabel, to export corn to Norway.¹³⁰ Second, the ability to leave the realm even with a licence prior to the declarations in Magna Carta, was not always easy, as illustrated by a case which occurred in the Spring of 1207. After obtaining the king's licence to allow him to journey to Ireland, William Marshal, had to give his second son to John as a hostage (John already held the oldest son) before he could sail.¹³¹ Third, as we have already noted, the restriction in the Constitutions of Clarendon was not considered a dead letter before 1215.¹³² Chapter 42 formally repealed the fourth of the Constitutions of Clarendon.

John's death brought Henry III to the throne with the Earl of Pembroke as *Rector regis et regni*. The Great Charter reissued on 12 November 1216 contained certain alterations and omissions. Chapter 41 of Magna Carta now appeared as chapter 37, as follows: "*Omnes mercatores, nisi publice antea prohibiti fuerint, habere saluum et securum exire de Anglia, et venire in Angliam. . .*"¹³³ John's surrender of England to the Pope on 15 May 1213,¹³⁴ was to strengthen the papal prerogatives over England for the remainder of John's reign and the entire reign of Henry III. The 1216 reissue of Magna Carta omitted chapter 42 as did all subsequent re-issues. Such a step was germane to the secular authorities' attempt to block infringements by the Roman See.¹³⁵ The omission meant a reversion to past practices. In the 7th year of Henry's reign, 1222-23, the following case was re-

¹²⁹ *Id.* at 288. The English translation would be, "That merchants shall have safety to go and to come. . . ."

¹³⁰ *Id.* at 298. A relevant part of the translation reads, 'It shall be lawful in future for anyone . . . to leave our kingdom and to return, safe and secure . . .'. An abbreviated version of chapter 42 was included in chapter 33 of the Articles of the Barons which read, "*Ut liceat unicuique exire de regno et redire, salva fide domini regis, nisi tempore werrae per aliquod breve tempus propter communem utilitatem regni*". *Id.* at 288.

¹³¹ *Aern filius Mabilliae debet ij Girfalcones, pro Licentia ducendi Bladum in Norweiam*, 27 HENRY II 88 (1909) cited by T. MADOX, HISTORY AND ANTIQUITIES OF THE EXCHEQUER OF THE KINGS OF ENGLAND 323 (1711). See also, MCKECHNIE, *supra* note 112, at 466.

¹³² K. NORGATE, JOHN LACKLAND 145-6 (1902).

¹³³ A view also taken by A. L. POOLE, *supra* note 50, at 447.

¹³⁴ W. S. MCKECHNIE, *supra* note 112, at 584. The translation reads, "All merchants unless they have before been publicly prohibited, shall have safe and secure exit from England, and entry to England. . . ."

¹³⁵ W. STUBBS, SELECT CHARTERS, *supra* note 97, at 279; H. GEE & W. J. HARDY, DOCUMENTS ILLUSTRATIVE OF ENGLISH CHURCH HISTORY 75 (1896).

ported: "*Willielmus Marmion clericus profectus est ad regem Franciae sine licentia domini regis, et propterea finem fecit.*"¹³⁶ And, at a time when favourable relations existed between the Pope and King, Pope Honorius III found it necessary to express his indignation in a letter written to Henry dated 18 January 1224, to Henry's restriction against allowing his bishops to journey to the Apostolic See.¹³⁷

The 1216 re-issue endeavoured to account for the changes in the concluding clause which related that:

Since, however, some of the chapters which were contained in the former charter seemed onerous and doubtful, among which were the clauses respecting . . . the liberty of all subjects to leave and return to our kingdom . . . the prelates and great men of the realm who are named above have agreed to a delay in Our decision upon them, until We can obtain more complete information about them. Then we shall act fully in these matters, . . .¹³⁸

The failure of chapter 42 to reappear in the 1216 re-issue and subsequent re-issues did not mean a total restraint on travel. On the contrary, ample evidence in the Calendars to the Close Rolls and Patent Rolls discloses a certain amount of foreign travel.¹³⁹ But those who exercised the powers of state control, as well as the king who held the reins of power, were determined to maintain an unfettered discretion in the matter of egress of the king's subjects. Despite the retention of chapter 41 of Magna Carta, the merchants who wished to sail abroad still required the king's licence,¹⁴⁰ and periodically an entry¹⁴¹ was inscribed on the Rolls to indicate the application of the restriction. Henry, in some instances, deemed it necessary to issue a proclamation to restrain all persons *ne quis exeant reg-*

¹³⁶ W. S. McKECHNIE, *supra* note 112, at 474.

¹³⁷ W. S. McKECHNIE, *supra* note 112, at 474, n. 1.

¹³⁸ 1 ROYAL AND OTHER HISTORICAL LETTERS ILLUSTRATIVE OF THE REIGN OF HENRY III, 218-9 (W. W. Shirley ed. 1862-1866). The English bishops to whom the Pope refers are the Bishop of Winchester and Peter de Rupilsus. See also, F. A. GASQUET, HENRY THE THIRD AND THE CHURCH 79 (1905).

¹³⁹ The translation is given by C. M. WHELAN, *supra* note 15, at 67.

¹⁴⁰ For example, on 1 January 1238 the issue of a "licence for Patrick de Chaurces to go beyond seas to visit his parents until Michaelmas," CAL. PAT. ROLLS, 1232-1247 207; on 16 October 1242, the issue of a "licence until Easter for James son of Nicholas, William de Waltham with the sons of W. de Cantilupo, and all clerks born in the realm of France, to return to their own parts; with mandate to the barons of the Cinque Ports not to make or permit any hindrance to them by sea or land," CAL. PAT. ROLLS, 1232-1247 331; and on 8 September 1237 the issue of a "Licence for Robert de Monasteriis and Bertram le Bigod to go beyond seas to sue for their lands with the King of France," CAL. PAT. ROLLS, 1232-1247 195. A prolonged excavation in the Calendars to the Patent Rolls and Close Rolls, the Rolls of Parliament, Rymer's *Foedera* and Nicholas' *Proceedings and Ordinances of the Privy Council* will surrender numerous examples of licences to travel.

¹⁴¹ An example is given in the license issued on 14 June 1237 "for Peter de Rivallis to go beyond seas on business, on condition that he be with the king in England on the morrow of All Souls, 22 Henry III, to do what he shall have to do touching those things which the king shall will to speak against him (era eum)," CAL. PAT. ROLLS, 1232-1247 186.

num without the king's licence¹⁴² either due to a public danger or *pro hac vice*.¹⁴³ The implication being that ordinarily persons could leave the realm without a licence. Such a view would be inconsistent with the practice as witnessed in the Calendars to the Close Rolls and Patent Rolls.

Britton tells us of the conduct of his own day, Edward I's reign, that "... no great lord or knight of our realm ought to travel forth of it without our licence since by that means the kingdom might be left destitute of able persons. . . ."¹⁴⁴ This statement reflects one obligation which followed the impressive revolution in the English army during Edward's time.¹⁴⁵ It was a view which found successive merit with Fitz-Herbert, Coke, Hale, and Blackstone.¹⁴⁶

During 1290, that segment of the population which adhered to the Jewish faith was expelled from England. If the individual was free to leave the realm at the time, it would not have been necessary to equip the Jews with the proper documents which would entitle them to leave the realm. Some 16,500 passports were issued to carry out the expulsion. Moreover, it was necessary for the king to provide the following ordinance:

Letters Patent directed to the Bailiffs, Barons and sailors of the Cinque Ports granting a safe conduct for the Jews leaving the realm with their wives, children and goods, and asking that only reasonable charges should be made to the poor Jews so that their leaving the country should not be impeded 27 July, 1290.¹⁴⁷

During the remainder of Edward's reign there is an intermittent use of restraint on travel which demonstrates the range of its applicability. Edward declared war on France in June 1294 and directed John Baliol, the King of Scotland who had pledged homage to Edward, to forbid the departure from his ports of any man or vessel going overseas,¹⁴⁸ presumably due to the public danger. On 31 July 1295, it was necessary for Pope Boniface VIII to request Edward to grant the bishop of Winchester a licence so that he could come to Rome.¹⁴⁹ It was obvious that the alliance between the Papacy and the Crown of England which thrived from the time of John ended with the accession of Edward.

On 31 January 1297, it was necessary for the King in Council to issue

¹⁴² See for example, the king's writ of 12 July 1234, CAL. CLOSE ROLLS, 1231-1234 570-1.

¹⁴³ SIR MATHEW HALE, *supra* note 19, at 91.

¹⁴⁴ 10 SIR WILLIAM HOLDSWORTH, *supra* note 24 at 390, and authorities cited there.

¹⁴⁵ See note 16, *supra*.

¹⁴⁶ See generally, M. POWICKE, MILITARY OBLIGATION IN MEDIEVAL ENGLAND 96-117 (1962). SIR ANTHONY FITZ-HERBERT, *supra* note 17, at 204; SIR EDWARD COKE, *supra* note 18, at 179; SIR MATHEW HALE, *supra* note 19, at 91; 1 W. BLACKSTONE, *supra* note 20, at 265.

¹⁴⁷ THE JEWS IN ENGLAND 16 (1957). The Jews were given 2 months to depart under the penalty of death. See also, CAL. OF PAT. ROLLS, 1281-1292, 378, 381, 382 and 1 T. RYMER, FOEDERA, *supra* note 95, at 736.

¹⁴⁸ 1 T. RYMER, FOEDERA, *supra* note 95, at 801.

¹⁴⁹ *Id.* at 823.

a proclamation "against leaving England without licence," probably to remind the clergy of the departure procedure since they had been put outside the king's protection the previous day. During March of the same year an ordinance was issued in the same terms as the preceding proclamation.¹⁵⁰ There is also Edward's mandate of 4 October 1304 to the Warden of the Cinque Ports, Robert de Kendale, to prevent the departure of all knights and esquires who might try to leave the realm.¹⁵¹

Before leaving the reign of Edward I, I mention again Britton's reference, to prevent the lords from departing the realm without licence otherwise the realm might be destitute of able persons, and suggest that this statement demonstrates the transition of the King's Council into a settled institution. Bishop Stubbs judged that Edward "seems thus to have accepted the institution of a council as a part of the general system of government, and . . . to have given it definiteness and consistency."¹⁵² Hence the king had to have a certain number of his councillors with him, if not within close reach, for possible consultation,¹⁵³ a point twice raised in parliament during the reign of Edward II.¹⁵⁴

Edward II followed a similar policy with respect to subjects leaving the realm as did his father. During the war with Scotland in 1309, Edward issued a proclamation that inhibited his nobility from leaving the realm.¹⁵⁵ On 5 November 1317, the king sent a mandate to the Warden of the Cinque Ports to prevent everyone from leaving without the king's special licence¹⁵⁶ which suggests that the subject desirous of going abroad was obliged to present a special passport from the king. To maintain the safe defence of the realm, the king proclaimed on 26 April 1321, that no knight or man-at-arms was to leave England.¹⁵⁷ Edward also found it necessary on 15 August, 1325, to alert the Warden of the Cinque Ports that no abbots or other religious persons were to leave the realm.¹⁵⁸ Just before resigning his throne, Edward ordered, on 13 January 1326, that none of his subjects save merchants were allowed to cross out of England.¹⁵⁹ The exercise of the king's prerogative during the emergency of a public danger is only reasonable, and it is assumed that the effect of the legislation would

¹⁵⁰ 5 R. R. STEELE, A BIBLIOGRAPHY OF ROYAL PROCLAMATIONS OF THE TUDOR AND STUART SOVEREIGNS AND OF OTHERS PUBLISHED UNDER AUTHORITY 1483-1714 clix (1910).

¹⁵¹ 2 T. RYMER, FOEDERA, *supra* note 95, at 58.

¹⁵² 2 W. STUBBS, CONST. HIST. *supra* note 29, at 258.

¹⁵³ For the changes in the Council during Edward's reign see, J. F. BALDWIN, THE KING'S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 69 (1913).

¹⁵⁴ *Id.* at 397.

¹⁵⁵ The proclamation issued on 8 October 1309 can be found in 2 T. RYMER, FOEDERA, *supra* note 95, at 95.

¹⁵⁶ *Id.* at 347.

¹⁵⁷ *Id.* at 447.

¹⁵⁸ *Id.* at 604.

¹⁵⁹ *Id.* at 618.

lapse when the event which gave rise to its issuance passed, however, the answer is by no means clear as to the duration of effectiveness of the legislation enacted at other times.

The reign of Edward III opened with a number of royal proclamations designed to restrain various groups of his subjects from leaving the realm. On 3 April 1327, all religious persons were to be restrained if they did not present the king's licence, while on 30 April 1327, English merchants were precluded from departing the realm until they joined a staple.¹⁶⁰ The last mentioned restriction was soon followed by the Statute of Northampton passed in 1328 which stated in part:

Item, it is enacted, That the Staples beyond the Sea and on this Side, ordained by Kings in Times past, and the Pains thereupon provided, shall cease; and that all Merchant Strangers and privy, may go and come with their Merchandises into England, after the Tenor of the Great Charter; and that Writs thereupon shall be sent to all Sheriffs of England, and to Mayors and Bailiffs of good Towns, where need shall require.¹⁶¹

Despite the Statute, the king was called upon to specifically order the Sheriff of Lincoln on 20 February 1329, to permit English and foreign merchants to enter or leave the country.¹⁶²

The practice of leaving the realm without a passport must have applied only in some parts of the country, otherwise the law was just not enforced, for on 3 August 1328, and on 24 April 1329, Edward issued proclamations stipulating that no person was to leave the realm without his license.¹⁶³ Yet two days after the proclamation of April 24th, letters had to be sent Bartholomew de Burghersh, Constable of Dover and Warden of the Cinque Ports, to the mayor of London and to the mayors and bailiffs of twenty-five other towns on the same subject.¹⁶⁴ In February 1331, the difficulties with France were set at rest for awhile and there was an interval of peace with Scotland so that it was somewhat surprising to find the orders from Edward and his Council issued to several Sheriffs and William de Clynton, Warden of the Cinque Ports, on February 24th, to proclaim the men-at-arms, horses and armour were not to leave the realm without special licence from the king.¹⁶⁵

On 10 June 1336, Edward ordered the Warden of the Cinque Ports to prevent any religious person from leaving England.¹⁶⁶ War with Scotland and the threat of a French invasion in 1336, were probably behind the

¹⁶⁰ *Id.* at 701, 705.

¹⁶¹ 2 EDWARD III, c. 9, 1 STATUTES OF THE REALM, 259 (1810). For the subsequent history of this legislation during the reign see, 1 W. LONGMAN, THE HISTORY OF THE LIFE AND TIMES OF EDWARD THE THIRD 74 (1869).

¹⁶² 2 T. RYMER, FOEDERA, *supra* note 95, at 757.

¹⁶³ *Id.* at 746, 761.

¹⁶⁴ *Id.* at 761.

¹⁶⁵ *Id.* at 810.

¹⁶⁶ *Id.* at 940.

travel restraints issued on November 6th and December 15th.¹⁶⁷ By 1340 England was impoverished due to the finance of the wars and it was necessary to encourage greater trade to resuscitate the treasury. To assist this programme a confirmation of the rights and liberties of the merchants by chapter 41 of Magna Carta 1215, was rendered by Parliament in 14 Edward III, statute 2, chapter 2.¹⁶⁸ Throughout most of 1341, Edward was preparing for a renewal of war with France, using the dispute over the succession to the Duchy of Brittany as his reason. To be in readiness for the invasion, Edward and the Council issued a proclamation on 20 December 1341 against persons going overseas and as the expectation of conflict drew closer on 20 February 1342, he wrote to all the Sheriffs that no Earl, Baron, soldier or other man-at-arms should be permitted to leave the country without his leave.¹⁶⁹ During the period 1344-1348, Edward was busy either in preparation for war, or at war, a state of affairs which brought with it the usual run of warnings against different groups of his subjects leaving the realm.¹⁷⁰

The Black Death plague appeared in England during 1347 and gradually began to take its heavy toll of life until 1349. The pestilence caused Edward to issue a proclamation on 20 November 1348 to prevent his subjects from going overseas¹⁷¹ and another on 1 December 1349, probably to prevent emigration of the survivors. The proclamation of 1349 reads in part:

Forasmuch as no mean part of our people of our realm of England is dead in the present pestilence, and the treasure of the said realm is mostly exhausted, and numbers of this our kingdom are daily passing, or proposing to pass, to parts over sea with money which they are able to have kept within the realm, Now we, taking heed that if passage after this manner be tolerated, the kingdom will in a short time be stripped both of men and of treasure, and so therefrom grave danger may easily arise to us and to the said realm, unless a fitting remedy be speedily appointed—[I] do command the mayor and bailiffs of Sandwich (and forty-eight other ports) to stop the passage beyond sea of them that have no mandate, especially if they be Englishmen, excepting merchants, notaries, or the king's envoys.¹⁷²

On 28 January 1350, Edward issued a proclamation¹⁷³ to the mayors,

¹⁶⁷ *Id.* at 950, 951.

¹⁶⁸ 1 STATUTES OF THE REALM, 290.

¹⁶⁹ R. R. STEELE, *supra* note 150, at clxv and 2 T. RYMER, FOEDERA, *supra* note 95, at 1188, respectively. For the sequence of events in Edward's preparation to invade Brittany see, 1 W. LONGMAN, *supra* note 161, at 194.

¹⁷⁰ See, Edward's orders dated February 9th 1344, March 25th 1344, October 15th, 1344, February 20th, 1345, March 10th, 1345, July 10th, 1346, October 18th, 1347, October 28th, 1347 and June 4th, 1348, found in 3 T. RYMER, FOEDERA, *supra* note 95, at 4, 10, 24, 30, 32, 85, 140, 141 and 161 respectively.

¹⁷¹ R. R. STEELE, *supra* note 150, at clxvi.

¹⁷² 3 T. RYMER, FOEDERA, *supra* note 95, at 191. The translation is from 1 C. CREIGHTON, A HISTORY OF EPIDEMICS IN BRITAIN 180-1 (1965).

¹⁷³ CAL. CLOSE ROLLS, 1349-1354 207-07.

bailiffs and sheriffs of forty-nine towns, ports and counties in which he directed that no man-at-arms, pilgrim or other person be allowed to cross from any of the ports listed in the proclamation. The extent of the prohibition contained in the January proclamation must have enveloped all of the King's subjects including merchants, because the Council found it necessary to issue a proclamation on February 6th directing the royal officials to allow all merchants to depart for Flanders.¹⁷⁴ Departure was actually authorized for merchants, masters and mariners provided that they took only reasonable expenses for the journey and did not allow unauthorized persons to cross with them. Port authorities had to receive official confirmation before permitting these persons to leave on each trip.¹⁷⁵

Either stringent control over departure must have been impossible or the proclamation of February 6th must have run its course for on 23 June 1350, Edward addressed another proclamation¹⁷⁶ to the mayors, sheriffs and bailiffs of twenty ports and seventeen counties, to prevent anyone from leaving the realm. Specifically singled out were knights, barons, men-at-arms and pilgrims. It might be mentioned that whenever an order, ordinance or proclamation went out for the restraint on movement abroad, it was usually addressed to the officials charged with the responsibility of enforcing the law. Persons so charged were sometimes admirals, sheriffs, mayors, bailiffs, port authorities, and keepers of the passage, either individually or collectively.¹⁷⁷ Before the year ended, the King and Council issued a proclamation which called for the detention of any earl, baron, knight, squire, man-at-arms or archer who attempted to leave the country without the King's special licence.¹⁷⁸

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In the immediate years following the Black Death, the remaining population had to be curbed from most travel, domestic as well as foreign, in order to revive the economy and solve the labour shortage. It is not surprising then to find the previous trends of restraint on mobility extended as exemplified in 1351, on the issue of a proclamation by the King and

¹⁷⁴ CAL. CLOSE ROLLS, 1349-1354 158. The Ordinance was addressed to sheriffs, mayors and bailiffs of all ports as well as to William Walkelate, the King's serjeant-at-arms appointed to inspect ships crossing abroad from the Thames River. Other licences were issued to individuals who wished to depart; see licences issued in 1350 on February 2, April 8, July 16, September 8 and October 18 found in CAL. CLOSE ROLLS, 1349-1354 210, 212, 247, 267 and 271 respectively. A licence issued on 10 July 1350 indicates the procedure open to persons who did not readily satisfy the royal officials. The applicant in question had to appear in Chancery with mainprenors who posted recognizance that the applicant would return—CAL. CLOSE ROLLS, 1349-1354 246.

¹⁷⁵ See the Order issued by the King and Council to the authorities in Lenne and The Thames on 20 April, 1350, CAL. CLOSE ROLLS, 1349-1354 213-214.

¹⁷⁶ 3 T. RYMER, FOEDERA, *supra* note 95, at 199; CAL. CLOSE ROLLS, 1349-1354 233.

¹⁷⁷ See the Writs of 18 October 1350 in CAL. CLOSE ROLLS, 1349-1354 271-72, and the Order of 12 July 1350 found in CAL. CLOSE ROLLS, 1349-1354 239.

¹⁷⁸ CAL. CLOSE ROLLS, 1349-1354 280.

Council on July 6th¹⁷⁹ in which officials of thirteen counties and twenty-one ports were instructed to arrest and detain any knight, baron, religious person, soldier, man-at-arms, archer, craftsman, workman or other person of any rank who sought to depart the realm without the king's licence. Although not specifically singled out, this proclamation also applied to merchants for the Council had to send special orders on July 10th¹⁸⁰ to the officials of twelve ports instructing them to permit all known merchants to sail abroad despite the proclamation issued four days earlier. A countermand¹⁸¹ was sent in the name of the King and Council on October 17th to Bartholomew de Burghersh, the Warden of the Cinque Ports, and officials of nine ports, with instructions to prevent anyone leaving without the King's licence except the King's envoys and other persons sent on the King's affairs. Furthermore, on November 6th, the Warden of the Cinque Ports and officials of twelve ports received orders from the King and Council¹⁸² to bar the departure of any men-at-arms.

When it was suspected that persons would try to leave from a particular port without a passport, extra officials would be appointed to the area to take up the vigil and pursue investigations.¹⁸³ In a proclamation dated 20 April 1352,¹⁸⁴ the King refers his officials in seven ports to the general proclamation (probably the one dated 28 January 1350) and indicates that unauthorized persons were leaving the country illicitly to reveal state secrets to the enemy. Edward ordered the officials to prevent anyone from leaving the realm without his special licence.

Aside from these proclamations which alerted the officials as to the royal wishes, the King periodically launched an inquiry to determine whether these restrictions on travel were rigidly enforced or were lax. This procedure was followed in 1353, when the Court of Shepway and other courts in the various ports held inquiries into cases of "evil-doers crossing the sea without licence."¹⁸⁵ Although a truce between England and France expired on 12 September 1352, peace was prolonged until the following year. Edward, however, wanted to be prepared when the war was renewed and consequently issued a proclamation on 14 October 1353 which forbade

¹⁷⁹ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 226.

¹⁸⁰ CAL. CLOSE ROLLS, 1349-1354 310.

¹⁸¹ CAL. CLOSE ROLLS, 1349-1354 391.

¹⁸² CAL. CLOSE ROLLS, 1349-1354 397-98. It appears that the Warden of the Cinque Ports had been neglectful in his duty to report the departure of unauthorized persons since it was necessary for the King to remind him of the Proclamation of 28 January 1350 and subsequent orders to enforce the proclamation. On 6 November 1351, the King ordered him to certify who had crossed without a licence and let the King know in Chancery as soon as possible. This last move was probably to allow the King to claim forfeiture of the guilty person's property. CAL. CLOSE ROLLS, 1349-1354 399.

¹⁸³ See for example, the appointment of 26 November 1353, CAL. PAT. ROLLS, 1350-1354 542.

¹⁸⁴ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 242.

¹⁸⁵ K. M. E. MURRAY, *THE CONSTITUTIONAL HISTORY OF THE CINQUE PORTS* 68 (1935).

men-at-arms from leaving the realm.¹⁸⁶ All exits were to be controlled. On 6 November 1354, Edward ordered the Warden of the Cinque Ports to prevent persons from leaving England at Margate and other private places.¹⁸⁷

Papal influence in England was about to suffer another set-back in this period through Parliament's anti-papal legislation.¹⁸⁸ As part of the same policy, pilgrims had to be stopped from journeying abroad, and the appropriate instructions were contained in Edward's writ dated 10 February 1354, addressed to his sheriffs.¹⁸⁹ Ten days later, the King ordered¹⁹⁰ the sheriffs of fourteen counties and officials in twenty-two ports to enforce his general proclamation against allowing any of his subjects to leave the realm without his licence. Prevention of the departure of unauthorized pilgrims was the subject of the King's proclamation dated 6 February 1355,¹⁹¹ which reached his officials in forty ports and the Warden of the Cinque Ports. Mariners and masters were warned not to carry any pilgrims aboard ship who did not have the King's licence. On 12 June 1355, the King and Council issued a proclamation¹⁹² prohibiting anyone from going overseas while on September 15th that year, the King ordered¹⁹³ that no person was to go abroad before the feast of Michaelmas without his licence.

After England and France agreed to a truce at Bordeaux on 23 March 1357, Edward turned his thoughts to the problems in Ireland and on April 1st ordered that the Archbishop of Ireland, who was then in England, was to be prevented from leaving England without his licence.¹⁹⁴ On April 7th, Edward directed his sheriffs in London, and the mayors and bailiffs of eight other ports, not to allow any person to leave the realm without his licence, particularly ecclesiastics. Singled out for specific restraint were the Augustinian Friars or Hermits who were to be prevented from crossing the sea even if they possessed a special licence dated earlier than Edward's order. The order was to remain in force until further notice.¹⁹⁵ Many of the succeeding proclamations down to 1396 were issued on the eve of, or during the sporadic battles of England's Hundred Years War with France.

On 20 November 1358, Edward and his Council informed the Warden

¹⁸⁶ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 263.

¹⁸⁷ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 290.

¹⁸⁸ THE FIRST STATUTE OF PROVISOIRS, 25 EDW. III, St. 4 found in 1 STATUTES OF THE REALM 316, and the FIRST STATUTE OF PRAEMUNIRE, 27 EDW. III, St. 1, c. 1, 1 STATUTES OF THE REALM 329.

¹⁸⁹ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 272.

¹⁹⁰ *Id.* at 272-73.

¹⁹¹ *Id.* at 295.

¹⁹² R. R. STEELE, *supra* note 150, at clxvii.

¹⁹³ CAL. CLOSE ROLLS, 1354-1360 226. The same Order was given by Edward on 26 September 1355, CAL. CLOSE ROLLS, 1354-1360 228.

¹⁹⁴ 3 T. RYMER, *FOEDERA*, *supra* note 95, at 352.

¹⁹⁵ *Id.* at 353.

of the Cinque Ports, Roger de Mortimer, that he or his deputy at Dover, was to prevent all persons from leaving the country at that port unless they carried a special licence. On the same date, proclamations were sent to the mayors and bailiffs of Margate and Sandwich to prevent all crossings from their port except mariners and sailors.¹⁹⁶

At the time of Edward's siege of Paris on 16 March 1360, writs were sent to the mayors and bailiffs of twenty-nine ports to prevent all persons from crossing to foreign parts.¹⁹⁷ Later that year, in August, while negotiations were in progress for peace, the King and his Council caused the mayors and bailiffs of sixteen ports to proclaim that anyone who attempted to cross the sea to Normandy or Brittany with arms, armour, horses, or harnesses without a licence under the privy seal was to be arrested and detained in custody. Persons who did cross without a licence forfeited their property.¹⁹⁸

Resumption of the war with France led the King to address a general proclamation on 30 April 1361 to the sheriffs, bailiffs and mayors of ports, towns and counties to proclaim that no soldier, man-at-arms, pilgrim or other man (merchants excepted) were to cross out of England or to attempt to cross either secretly or openly without special licence. Persons who offended were to be arrested, kept in custody and their property forfeited.¹⁹⁹ Although merchants are excepted in many of these proclamations, it indicates that necessity dictates the extent of the restraint rather than taking the view that Article 41 of Magna Carta was not considered a dead-letter.²⁰⁰

Restraints on travel were ordered for individuals upon occasion, as well as for classes of persons or the entire nation. A prime example occurred on 12 July 1366, when Edward forbade Sir William de Cloptom, junior, Walter and Edmund Cloptom from leaving the country. The writ enjoining the three from leaving does not disclose any reason for the restraint although they were threatened with forfeiture of their possessions if they disobeyed.²⁰¹ In the following year, on February 8th, a general proclamation by the King and Council ordered the mayors and bailiffs of towns, ports and counties to proclaim publicly the prohibition of anyone crossing the sea and taking horses or arms out of the kingdom without special licence under pain of forfeiture of life, limb and property. Known merchants were excepted but they could not cross the sea with horses or arms. Persons who disobeyed were to be arrested and held in custody while the

¹⁹⁶ *Id.* at 411; CAL. CLOSE ROLLS, 1354-1360 539.

¹⁹⁷ T. RYMER, *FOEDERA*, *supra* note 95, at 476.

¹⁹⁸ *Id.* at 506. On August 13th, Commissions were given to sergeants-at-arms, Thomas de Stafford and William Walkelate to enforce this order.

¹⁹⁹ *Id.* at 614-15.

²⁰⁰ Similarly merchants were excepted from the need of a special licence to leave the country in the ordinance of the King and Council issued on 4 May 1363. *Id.* at 698.

²⁰¹ *Id.* at 796.

King was notified.²⁰² A further general proclamation against the liberty of the subject in journeying abroad was issued on 28 April 1373.²⁰³

There is a reference to an ordinance of the King's Council traceable to 10 February 1376 which stated that,

. . . none shall cross the sea without the realm without the king's special licence . . . and that none going with the king's licence to the court of Rome or other foreign parts pass in any port until he have found security before the king in the Chancery not to attempt anything to the prejudice of the king or people. . . .²⁰⁴

Commissions were issued by the Council on 18 October 1377, 5 and 14 February 1378, and 11 April 1378, which ordered the addressees to initiate investigations, either personally or by their deputy, in all towns and ports of Kent including the territorial waters, whether the ordinance of the King's Council was being enforced and whether anyone passed beyond the seas without the King's special licence, well-known merchants in the exercise of their trade excepted.²⁰⁵ On 15 November 1377, a Commission was given to three persons with instructions to arrest all lieges proposing to cross the seas without a licence to join the King's enemies.²⁰⁶

Despite these temporary prohibitions, travel during the period especially by pilgrims must have been quite considerable for even Chaucer's wife of Bath as related in the prologue to the *Canterbury Tales*, had thrice

ben at Jerusalem,
She hadde passed many a strange streme;
At Rome she had been and at Boloine,
In Galice at St. James, and at Coloine.

A proclamation dated 1 May 1378 specified that no person shall presume to leave the realm without the King's licence issued under the Great Seal,²⁰⁷ which is significant considering that several seals including the Great Seal were used to issue licences. On 8 May 1380, the custodians of the ports of London, Dover and Sandwich, were elected by the King with orders that no persons could leave the realm without his special licence.²⁰⁸ During 1381, several proclamations and a statute restricted the subject's

²⁰² *Id.* at 818-19. Despite this proclamation a large number of licences were issued towards the end of 1367 and early 1368; see, CAL. PAT. ROLLS, 1367-1370 52-59, 70-75, 126-134 and *Chancery Warrants*, Ser. I, Files 916-926, 42-43 Edw. III.

²⁰³ T. RYMER, FOEDERA, *supra* note 95, at 975.

²⁰⁴ CAL. PAT. ROLLS, 1374-1377 312. William Palyngham and William Palfreyman were appointed to make such scrutiny in the port of Kyngeston and vicinity. Other persons were appointed for similar objects on 5 May, 20 May, 3 August, 17 October, 27 October, and 28 November 1376, CAL. PAT. ROLLS, 1374-1377 313.

²⁰⁵ CAL. PAT. ROLLS, 1377-1381 52.

²⁰⁶ CAL. PAT. ROLLS, 1377-1381 63.

²⁰⁷ 4 T. RYMER, FOEDERA, *supra* note 78, at 39.

²⁰⁸ 4 T. RYMER, FOEDERA, *supra* note 78, at 86; CAL. CLOSE ROLLS, 1377-1381 387. Examples of licences issued during 1378 and 1379 are found in "Write to Custodes Passagii," *Supplementary Close Roll No. 14*, CAL. CLOSE ROLLS, 1377-1381 526 *et seq.*

freedom of movement. On July 3rd, the King proclaimed that departures could only be effected at Dover.²⁰⁹ Two days later, he issued a proclamation that made his licence mandatory for anyone wishing to go abroad.²¹⁰ Parliament dealt with the licence requirement as a prerequisite for foreign travel in these words:

And the King our Lord, of his Royal Majesty, defendeth the Passage utterly of all manner of People, as well Clerks as other, in every Port and other Town and Place upon the Coast of the Sea, upon Pain of Forfeiture of all their Goods; except only the Lord's and other Great Men of the Realm, and true and notable Merchants, and the King's Soldiers; and every Person, other than is before excepted, which after Publication of this Ordinance made, shall pass out of the said Realm, without the King's special Licence . . . shall forfeit to the King as much as he hath in Goods. . . .²¹¹

The Statute prescribed a penalty against those persons who transported Englishmen without a passport, other than those individuals specially excepted, of forfeiture of the vessel carrying such persons.²¹²

Prior to the passage of the Statute, the subject could be kept from leaving the realm either by proclamation or by writ *de securitate invenienda ne exeat regnum*. Use of either of these methods only sustained a temporary impediment to travel. In the absence of either proclamation or writ, a subject not possessing the King's licence could still have his mobility restricted according to the stated formula in the first part of the writ, *absque licentia nostra clam destinas exire vel te divertere ad partes externas*.²¹³ Enactment of this Statute created exceptions to the practice of the day and had the effect of permanence by way of operation when measured against the longevity of the proclamation or writ.

An early application of the 1381 Statute is seen in the Petition of Agnes Bales to the Lord Chancellor in 1394. In her bill, the petitioner sought redress for the arrest of her goods that took place when she tried to cross from England without the King's licence.²¹⁴

The old practice calling for the deposit of security by ecclesiastics to preserve their loyalty to the King before permitting them to visit Rome is

²⁰⁹ 4 T. RYMER, FOEDERA, *supra* note 95, at 127.

²¹⁰ *Id.*

²¹¹ 5 RICHARD II, STAT. 1, c. 2 is found in 2 STATUTES OF THE REALM 18. The Statute stipulates that departure will only take place from the Ports of "London, Sandwich, Dover, Southampton, Plymouth, Dertmouth, Bristow, Yarmouth, St. Botolph, Kingston upon Hull, Newcastle upon Tyne, and the other Ports and Passages towards Ireland, and the Isles pertaining to the Realm of England."

²¹² Also, all Wardens and Searchers of the ports and passages were to "Make good and strait search." The penalty is spelt out more fully in 3 ROTULI PARLIAMENTORUM 120a (1278-1503).

²¹³ This construction was raised in a case arising in the first year of the reign of Elizabeth I, *Dover*, 165b. On the application of the writ *see*, *The Company of Merchant Adventurers v. Rebow*, 3 Mod. 126, 127; *Carter's Case*, 1 Leon. 9; *Sands v. Child*, 4 Mod. 176, 177.

²¹⁴ 10 W. P. BAILDON, SELECT CASES IN CHANCERY 1364 TO 1471 70 (1896).

illustrated in the following passport issued to a chaplain on 7 October 1382 which was presented to the custodian at Dover:

*Rex Custodibus passagii in portibus Dovorré vel Sandewici, Salutem. Quia Willelmus Otecombe, clericus, et Thomas Brokhamtone, de comitatu Somersete, coram nobis in Cancellaria nostra personaliter constituti manuceperunt pro Willelmo Smogger, capellano, qui de licentia nostra versus curiam Romanam profecturus est, quod ipse in curia predicta aliqua nobis sen corone nostre prejuricielia non prosequetur, sen prosequi aut attemperi faciat, videlicet, utrique predictorum Willelmi Otecombe et Thome sub pena viginti librarum ad opus nostrum solvendarum; vobis mandamus quod ipsum Willelmum Smogger in altero portum predictorum versus Curiam predictam libere et absque impedimento aliquo transire permittatis; aliquo mandato nostro vobis in contrarium directo non obstante; dum tamen idem Willelmus Smogger aliqua nobis sen regno nostro Anglié prejudicialia secum non deferat ullo modo. Teste Rege, apud Westmonasterium, vii die Octobris.*²¹⁵

Sometimes travel for certain purposes was encouraged and persons wishing to leave England on these occasions did not encounter great difficulty in securing a passport. For example, in 1382 when the Bishop of Norwich went on his crusade, Parliament records that licences were available to anyone who wished to accompany him except persons in the retinues of the King and the Lords.²¹⁶ However, on 26 February 1383, the King and his Council sent a proclamation to Robert Assheton, the Warden of the Cinque Ports, Walter fitz Walter, the admiral of the north fleet, John de Roches, admiral of the west fleet, and mayors, bailiffs, sheriffs and keepers of the passage of twenty-four ports "forbidding any man, merchant or other, of whatsoever estate or condition, under pain of forfeiture to pass to any parts over sea until further order. . . ."²¹⁷

The policy for the excepted few in the 1381 Statute changed partially in 1388 with the passage of 12 Richard II, c. 5, which stated:

That no Liege Man of the King, of what Estate or Condition that he be, great or little, shall pass over the Sea, nor send out of the Realm of England, by Licence nor without Licence, without special leave of the King himself. . . .²¹⁸

Richard imposed this restriction to curb the influence of Rome by stopping his subjects from going abroad to purchase a benefice from the Holy Church.

Until 1389, Richard did not personally supervise the government due to his "minority." Soon after taking personal control, he announced that all persons except merchants, soldiers and men-at-arms, who wished to

²¹⁵ H. HALL, A FORMULA BOOK OF ENGLISH OFFICIAL HISTORICAL DOCUMENTS 85 (1906).

²¹⁶ 3 ROT. PARL. 148b.

²¹⁷ CAL. CLOSE ROLLS, 1381-1385 281-82.

²¹⁸ 2 STATUTES OF THE REALM 60.

leave England for lands other than Ireland had to leave from either Dover or Plymouth unless they had his special licence to leave from elsewhere.²¹⁹ With the threat of an invasion from Spain and France that year, the King's Council placed restrictions upon the "excepted persons" referred to in the 1381 Statute, in its proclamation of June 15th wherein the keepers of the passage of some twenty-two ports were instructed "to suffer no lieges . . . to pass to any foreign parts save known merchants, any previous command of the king notwithstanding."²²⁰

The restraint on travel became more stringent on 26 January 1390 when the King and his Council addressed a proclamation to the Warden of the Cinque Ports, John Devereux, and the keepers of the passage and searchers of seventeen ports "for causes which concern the common weal moved in this parliament, to suffer no person of whatever estate, degree or condition to pass to the court of Rome or other foreign parts . . . known merchants excepted who will pass over sea to traffic."²²¹ Before the year was out, the King and Council sent writs in a similar vein to the Warden of the Cinque Ports and the keepers of the passage of seven ports and the Thames River.²²² Despite the aforementioned restraints, Englishmen went abroad with official authorization as evidenced by the issued passports.²²³ Passports were issued during this period by the Chancellor and other Chancery officials upon presentation of a petition or bill in Chancery and by the King's Council upon a direct petition. The passports were always sealed with either the Privy Seal, the Great Seal or the Privy Signet. An example of a passport issued in 1390 appears as follows:

Licence, at the request of the King's uncle, the Duke of Gloucester, for William Arundell, knight, Simon Felbrigg, knight, and Robert de Teye, who propose to visit and see the world in diverse places, to pass beyond the sea from London, Dover, Sandwich or elsewhere with their men and twelve horses and to change \$300 of money for expenses.²²⁴

²¹⁹ 3 ROT. PARL. 275a-b.

²²⁰ CAL. CLOSE ROLLS, 1385-1389 592-3; 3 T. RYMER, FOEDERA 39 (Hague ed. 1739-45). All subsequent references to FOEDERA will be to the Hague edition unless otherwise indicated.

²²¹ CAL. CLOSE ROLLS, 1389-1392 112. The reference here to *common weal moved in this parliament* refers to 12 RICH. II, c. 15 (1388).

²²² Writs dated 3 November 1389 are found in CAL. CLOSE ROLLS, 1389-1392 28. Examples of passports issued from 1382 to 1393 may be examined in *Supplementary Close Roll No. 15 (Exchange Roll)*, CAL. CLOSE ROLLS, 1392-1396 518 *et seq.*

²²³ CAL. CLOSE ROLLS, 1389-1392 569-73.

²²⁴ CAL. PAT. ROLLS, 1388-1392 188. During this period the King's licence to leave the realm resembled the letter of protection. It is worth citing Penoy's observations, of thirty-five years ago, to illustrate the other documents which the intending traveller sought before embarking on a trip; he said:

The King's subjects, when leaving England, applied for (a) *litterae de protectione*, and *litterae de attornatu*: these were enrolled on the French Rolls, if the traveller intended to cross to the Continent, on the Patent Rolls for Ireland, on the Scots Roll for Scotland; but revocations of letters of protection, generally due to the fact that the subject had not gone abroad as intended, were enrolled on the Patent Rolls. (b) When the traveller was especially dear to the King, he obtained *litterae de familiar-*

The turn of the century did not bring an abatement to the operation of the 1381 Statute nor to the King's efforts to preclude those exempted by the Statute from freely leaving England. Whenever the King or his Council wished to bar travel, the requisite proclamation or writ would be issued, as occurred on 5 January 1400. At the time, Henry was most apprehensive about war with France and consequently ordered his keepers of the passage in twenty-five ports not to allow any liege, alien, merchant or any other person to leave England without his licence.²²⁵ Thirteen days later the King and the Council partially recanted by ordering the keepers of the passage at Dover to permit known merchants to leave the realm.²²⁶ The exigencies of international life pressed the King to become more realistic and on January 22nd he authorized certain merchants, masters and seamen to leave the country for specific purposes.²²⁷ Whenever the events of the day required a more liberal attitude, the King simply countermanded his previous orders. Two further occurrences arose on January 23rd²²⁸ and February 15th²²⁹ whilst he was preparing for the defence of Calais against the French. Travel restrictions were tightened on August 16th when the Council issued writs²³⁰ to officials in thirty-four ports forbidding them upon pain of forfeiture, to permit any person other than known merchants to pass out of England without a special licence from the King. An unsigned order²³¹ was sent to the officials of Lenne on September 10th authorizing the departure of merchants, masters of ships and seamen without special licence; everyone else especially pilgrims required a passport.

On 26 May 1401, the King and Council sent a proclamation²³² to the keepers of the passage in eight ports who were required upon their allegiance and under the threat of forfeiture not to permit anyone save merchants to pass out of England without a licence. Because of the threat of war with the Scots, a blanket restraint on all travel out of England was contained in the King's proclamation of 26 June 1402.²³³ A countermand to the last-mentioned proclamation is found in the Council's writs²³⁴ sent to the

itate, a special commendation addressed to all princes of the world: (the present-day corresponding commendation would be the "request" statement in the British passport) some of these are also on the French Rolls, although others were issued under the Privy Seal. (c) But nobody who desired to pass overseas with a certain sum of money could leave England without a licence. These *litterae de passagio* or *de escambio* were enrolled on special rolls, very few of which have survived.

48 E. PENOY, *THE DIPLOMATIC CORRESPONDENCE OF RICHARD II* ix, n. 1 (1933).

²²⁵ CAL. CLOSE ROLLS, 1399-1402 37.

²²⁶ *Id.* at 29.

²²⁷ *Id.* at 27.

²²⁸ *Id.* at 39.

²²⁹ *Id.* at 49.

²³⁰ *Id.* at 177-8.

²³¹ *Id.* at 170.

²³² *Id.* at 344.

²³³ *Id.* at 540.

²³⁴ *Id.* at 542.

keepers of the passage of three ports on July 17th which directed them to allow known merchants and seamen to pass overseas.

On 10 and 13 August 1403, the King ordered the port authorities at Kyngeston upon Hull to allow seamen to leave the country despite his earlier command.²³⁵ Similar orders were given to the authorities at Lenne and Bristol on August 26th.²³⁶ On 18 August, Henry informed the keepers of the passage at St. Botolphs' that all known merchants were to pass notwithstanding other commands, proclamations and ordinances to the contrary.²³⁷

Sometimes the King took steps to prevent only one of his subjects from leaving England. A restraint of this nature was contained in the proclamation of 16 October 1404 which ordered that Robert de Teye, esquire,

upon his allegiance and under pain of forfeiture, not to repair to any foreign parts without special licence of the king by word of mouth, as the king has information that, contrary to the proclamations and prohibitions of times made throughout the realm, the said Robert is purporting shortly to pass out of the realm, and absent himself no small time.²³⁸

The King and his Council sent writs to the keepers of the passage in nine ports on 21 February 1405 enjoining them not to allow anyone except known merchants to leave the realm.²³⁹ On 7 February 1407 instructions were sent to all the keepers of the passage of ports in England and to the sheriffs throughout the realm that no subject or alien could leave England without the King's special licence "except known merchants, captains and hired soldiers of Calais and other castles and strongholds in the march of Calais, their officers and ministers, and officers and ministers of the staple."²⁴⁰

Because of the dispute over estates in France in 1412, and the King's desire to keep his subjects from rendering personal support to the contending parties, he sent proclamations²⁴¹ on April 12th to all the keepers of the passage, bailiffs of Canterbury, the captain of Calais and the Chancellor of the county palatine of Lancaster, to prohibit any of his lieges of whatever estate from going to France without his special licence. The following month, on May 13th, the King ordered the Warden of the Cinque Ports and the keepers of the passage of the ports of Dover and Sandwich not to permit anyone to cross overseas.²⁴²

²³⁵ CAL. CLOSE ROLLS, 1402-1405 101, 106.

²³⁶ *Id.* at 107.

²³⁷ *Id.* at 104.

²³⁸ *Id.* at 389. Another example of the restraint of the individual occurred to William Welde, abbot elect of St. Augustine Canterbury on 19 April 1387, CAL. CLOSE ROLLS, 1385-1389 223.

²³⁹ CAL. CLOSE ROLLS, 1402-1405 421-22.

²⁴⁰ CAL. CLOSE ROLLS, 1405-1409 261-62. *See also*, the same volume at 190.

²⁴¹ CAL. CLOSE ROLLS, 1409-1413 328; 4 T. RYMER, *FOEDERA*, *supra* note 95, at 9.

²⁴² CAL. CLOSE ROLLS, 1409-1413 275.

On 21 March 1413, the King issued strict orders to the keepers of the passage in eighteen ports and the admiral of England to prevent any person from going overseas.²⁴³ Licences were often issued to Englishmen which indicated limited restrictions on foreign travel; an example of this limitation was in the licence received by John Bremore on 14 June 1413 which forbade him from going to Rome while abroad.²⁴⁴ Control over freedom of movement out of England became stringent once again on 14 June 1416 when the King sent orders to the Warden of the Cinque Ports and the keepers of the passage in all English ports that no person was to leave the realm without his licence.²⁴⁵

There is a hiatus from 1416 until the last year of the century, during which it appears that no general proclamations were issued to prevent Englishmen from leaving their homeland. However, the passport requirement remained in force with the consequence that the King's permission still had to be obtained by all persons before undertaking a trip abroad.²⁴⁶

On 20 August 1499, proclamations were sent to the sheriffs of Kent, Norfolk, Suffolk, Essex and the Warden of the Cinque Ports informing them that ships were forbidden to carry unlicensed passengers who had not posted a surety against possible harm to the King. The words are familiar—

. . . now his grace commandeth and straightly chargeth that no ship nor boat pass, conveying any person or persons, over the sea without he so to be conveyed have a licence under the King's seal or sign manual, or else that it be such a person and of such substance and truth that the township where he passeth will be chargeable for his demeaning against the King, his realm, and his subjects And moreover his highness chargeth and straightly commandeth all manner of customers, comptrollers, searchers, and keepers of ports, that they nor any of them permit nor suffer any manner of person or persons to depart out of this his said realm without licence. . . .²⁴⁷

The ambit of coverage proved too extensive for a few days later Henry VII issued another proclamation instructing his officials that the foregoing proclamation was not to infringe the liberty of his merchants in passing overseas.²⁴⁸

²⁴³ CAL. CLOSE ROLLS, 1413-1419 5.

²⁴⁴ 4 T. RYMER, FOEDERA, *supra* note 220, at 56. Partial limitations or restrictions on travel abroad are found in many of the licences issued in the 14th, 15th and 16th centuries. Illustrations of these can be examined in the Calendars of the Patent Rolls and Close Rolls.

²⁴⁵ CAL. CLOSE ROLLS, 1413-1419 310; T. RYMER, FOEDERA, *supra* note 220, at 165.

²⁴⁶ See licences issued on 24 May 1417, 23 April 1426, 28 November 1432, 5 February 1435, 3 March 1448, 14 August 1457 and 28 November 1492 found in 4 T. RYMER, FOEDERA, *supra* note 220, at 200, 120, 186; 5 T. RYMER, FOEDERA, *supra* note 220, at 14, 186, 78 and 54 respectively.

²⁴⁷ 1 P. L. HUGHES & J. F. LARKIN, THE TUDOR PROCLAMATIONS: THE EARLY TUDORS (1485-1553) 53 (1964).

²⁴⁸ The proclamation issued on 1 September 1499 is found in *id.* at 53-54.

During the reign of Henry VIII, Parliament passed a great many anti-papal statutes designed to reduce the influence of the Roman Church in England. It is not surprising, therefore, to find the following provision in the Statute of 1533-34:

. . . Nor that any person religious or other resiant in any the Kynges Domynions shall from hensforth departe out of the Kynges Domynions to or for any visitacion congregacion or assemble for Religeon. . . .²⁴⁹

This meant that attendance at general councils held abroad, which was most liberal in the 15th century, was forbidden now to any of Henry's subjects without his prior approval.

Mary's sympathy lay with Rome and upon becoming Queen, she repealed many anti-papal statutes including the last mentioned Statute.²⁵⁰ When Elizabeth ascended to the throne in 1558, she rendered the 1533-34 Statute operative again.²⁵¹ Queen Elizabeth adhered to her father's policies in asserting temporal jurisdiction over all her subjects, and of course, clashed with Rome. In 1569 an apostolic messenger was dispatched to England to inform Englishmen that their Queen was a heretic whose pagan laws ought not to be followed. The next year, Pope Pius V excommunicated Elizabeth in the bull *Regnans in Excelsis*. Elizabeth retaliated in 1571 with the passage of *An Acte agaynst Fugytyves over the Sea* in which she reminded her subjects of the need to obtain a passport written under the Great Seal, the Privy Seal or the Privy Signet before leaving the realm other than those persons specially exempted in the statutes. The tenor of the 1571 Statute was as follows:

Forasmuch as the duetie of every Subject Consisteth chiefly in redinesse at all tymes to attende to the servyce of his Prynce and Sovayne Governor and of his Countrey, when he shalbe thereunto comaunded And allbe it by dyverse Lawes and Statutes of this Realme, none ought departe the same without specyall Lycense of the Prynce, except suche as in the Statutes be specially excepted. . . .²⁵²

The foundation of this section is, of course, the sovereign's old right to the service of her subjects whenever protection was necessary. Penalties were prescribed in the Statute against subjects and denizens who left without a passport or failed to return upon the Queen's order. The aforementioned provision was declaratory of the law in force prior to the statutory enactment for on 27 January 1570, the Queen pardoned one Richard Puttenham "for all offences in respect of leaving the country without licence committed before the present date."²⁵³ In a case before the Queen's Justices

²⁴⁹ 25 HEN. VIII, c. 21, s. 14 (1533-34), 3 STATUTES OF THE REALM 469.

²⁵⁰ 1 & 2 PHIL. & MARY, c. 8, s. 3 (1554-55), 4 STATUTES OF THE REALM 246.

²⁵¹ 1 ELIZ. I, c. 1, s. 2 (1558-59), 4 STATUTES OF THE REALM, 351.

²⁵² 13 ELIZ. I, c. 3 (1571), 4 STATUTES OF THE REALM 531.

²⁵³ CAL. PAT. ROLLS, 1569-1572 8.

of both Benches during the Michaelmas Term of 1571, one of the questions entertained was whether an English merchant could leave the realm to live elsewhere without the Queen's licence. It was decided that if there was no express prohibition or restraint by proclamation or writ *ne exeat regno*, no offence was committed by the subject leaving without a licence. The Court was expressing its view of the Common Law as it stood prior to the enactment of the Statute 5 Richard II, c. 2.²⁵⁴ Proceedings against individuals who failed to obtain the Queen's licence for foreign travel were instituted in the Court of Star Chamber.²⁵⁵

It seems unlikely that Englishmen with any worldly assets, who were cognizant of the Queen's venom towards Rome, would be willing to incur the wrath of their Queen by chancing the penalties prescribed in the various statutes for leaving the country without her permission, if the purpose of their journey left any doubt in the royal mind. This view is reinforced when the Englishman happened also to be a recusant, for his mobility within England was already very restricted. When a recusant named John Gifford of Chillingeton, confined to London in 1585, received permission to visit Bath for his health, his licence warned him not to "departe out of his Realme to anie place beyond the seas nor anie other Realme without her Majesties licence first obtained."²⁵⁶ Further restrictive measures were added by the Parliament of 1584-85 in *An Act againste Jesuites Semynarie Priestes and such other like disobedient Persons* which made it unlawful,

for any Person of or under her Highnes Obedience, at any time . . . duringe her Majesties Life . . . to send his or her Childe or other pson being under his or her Government into partes beyonde the Seas . . . without thee speciall Licence of her Majestie, or of foure of her Highnesse privie Counsell . . . (except Marchants . . . or to serve as Mariners. . .)²⁵⁷

Lastly, Lord Clarendon relates in his autobiography that travel abroad "in that strict time of Queen Elizabeth was not usual, except to Merchants and such Gentlemen who resolved to be soldiers."²⁵⁸ Perhaps this restriction caused Messers. Enster, a minister, and Egles, a clerk of a Justice of the Peace, to embark upon the forging of passports in 1596. They were apprehended and charged with the offence of forging passports. Upon conviction, they were sentenced "to be pilloried at the next Assizes, to be 'whopte' in Wilteshire, and fined each £5, and imprisonment."²⁵⁹

²⁵⁴ DYER 296a.

²⁵⁵ See the brief note on the case of *The Earl of Arundell* in CROMPTON, STAR CHAMBER CASES SHOWING WHAT CAUSES PROPERLY BELONG TO THE COGNIZANCE OF THAT COURT 21 (1630).

²⁵⁶ ACTS OF THE PRIVY COUNCIL, 1586-1587 19.

²⁵⁷ 27 ELIZ. I, c. 2, s. 5 (1584-85), 4 STATUTES OF THE REALM, 706.

²⁵⁸ 1 EDWARD, EARL OF CLARENDON, THE LIFE OF EDWARD EARL OF CLARENDON 3 (1761). The same point is made of the times by A. H. DODD, LIFE IN ELIZABETHAN ENGLAND 152-3 (1961).

²⁵⁹ Attorney-General v. Enster & Egles, reported in LES REPORTES DEL CASES IN CAMERA

James I indicated quite early in his reign that he was going to pursue a policy similar to that of his predecessor. The King's first Parliament passed *An Acte for the due Execution of the Statutes against Jesuits Seminarie Priests, Recusants, etc.* in which we read:

. . . That no Woman, nor any Childe under the Age of one and twentie yeares, (excepte Saylers or Ship Boyes, or the Apprentice or Factor of some Merchant in Trade of Marchandize) shall be permitted to passe over the Seas (except the same shall be by lycense of the Kinge his Heires or Successors, or of some sixe or more of the Kinge Privie Counsell. . . .²⁶⁰

References in both the 1584-85 and 1603 Statutes to the signatures on the licence of four or six Privy Councillors pertains to passports issued specifically to the categories of persons mentioned therein. Persons other than those designated under these Statutes who were desirous of leaving the realm might receive a passport bearing the signature of only one or two Privy Councillors,²⁶¹ or as we have recorded on one passport, the signatures of the King's Secretaries.²⁶²

In the third year of James I's reign, Parliament passed *An Acte to pvent & avoid dangers which may grow by Popish Recusant* wherein a further impediment to travel was cast in the announcement that children of subjects sent abroad for education without a licence could not inherit property until they took the Oath of Allegiance set out in 3 Jac. I, c.4, s.9. In addition, any person sending a child overseas without a passport, unless the child happened to be a merchant, their apprentice, a factor, mariner, or a soldier, was liable to a fine.²⁶³

In the following year, Parliament repealed the Statute, 5 Rich. II, St. 1, which had obstructed the passage of his Majesty's subjects out of the realm.²⁶⁴ McKechnie alludes that repeal of this Statute was somewhat unusual and he offers the explanation that it was done following the union of the crowns of England and Scotland since the Statute had been inimical to Scottish interests.²⁶⁵ Despite the repeal of the 1381 Statute, the King was still at liberty to prevent any of his subjects from leaving the realm²⁶⁶

STELLATA 1593 TO 1609, 48 (W. P. Baildon, ed. 1894). Nor was this the only abuse involving the counterfeiting of passports; see entry for 28 March 1596 in G. B. HARRISON, *THE ELIZABETHAN JOURNALS*, 2ND JOURNAL 83-84 (1938) and *ACTS OF THE PRIVY COUNCIL*, 1597-1598 135.

²⁶⁰ 1 JAC. I, c. 4, s. 7 (1603), 4 *STATUTES OF THE REALM* 1021.

²⁶¹ See the passports of 7 April 1600, *ACTS OF THE PRIVY COUNCIL*, 1599-1600 234.

²⁶² The passport issued on 10 September 1601, *ACT OF THE PRIVY COUNCIL*, 1601-1604 205.

²⁶³ 3 JAC. I, c. 5, a. 9 (1605-06), 4 *STATUTES OF THE REALM*, 108. See also, M. D. R. LEYS, *CATHOLICS IN ENGLAND 1559-1829* 60 (1961).

²⁶⁴ 4 JAC. I, c. 1, s. 4 (1606-07), 4 *STATUTES OF THE REALM*, 1135.

²⁶⁵ W. S. MCKECHNIE, *MAGNA CARTA* 475-476 (1905).

²⁶⁶ Coke maintained this view; see SIR E. COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 178 (4th Ed. 1669). Repeal of the 1381 Statute was proclaimed on 9 July 1607. The proclamation stated that subjects who wished to go abroad, required a licence signed by four of the Privy Councillors, 28 *CALENDAR OF STATE PAPERS, DOMESTIC, JAMES I*, 1603-1610 363; R. R. STEELE, *supra* note 150, at 121-22.

by the exercise of the prerogative through writ or proclamation. Moreover, the subject's need of securing a passport to depart did not disappear with the repeal of the 1381 Statute nor did it extend solely to those persons designated in 1 Jac. I, c. 4, s. 7. In fact, formidable evidence to the contrary exists to show that control over freedom of movement persisted. We find, for example, the Earl of Northampton's claim in August 1606, as the Warden of the Cinque Ports of inherent power to license all persons to pass beyond the seas. The Lord Warden requested that this authority be expressly recognized in legislation similar to that authorizing him to license women and children.²⁶⁷ Furthermore, warnings were frequently given to persons legally leaving the realm not to take anyone with them who did not possess a licence.²⁶⁸ Even foreigners were obliged to have permission before embarking and one instruction to the commissioners of the passage warned them that when the foreigner was leaving "to be careful that no English person steal over in his company."²⁶⁹

When licences were issued to Englishmen for foreign travel, the licence sometimes cautioned the bearer as to geographical restrictions.²⁷⁰ As large numbers of Englishmen left England in the immediate years after 1607, we can presume that restrictions on leaving the realm were relaxed. The condition requiring four Privy Councillors or their designates to sign the licence before the subject was authorized to depart continued although the numbers seeking such licences increased. Sometimes this prerequisite caused additional problems as shown in the petition to the Council dated 20 November 1622 by a group of poor subjects. The petition requested the Council to dispatch a new commission as many of the former commissioners were dead, and only three commissioners resided at the particular Custom House whereas the law called for four of the same to sign the licence to enable them to pass overseas.²⁷¹ On 24 January 1621 a commission empowered Lord Bacon, the Lord Chancellor, to issue commissions pertaining to travel in the King's name and under the Great Seal whenever he deemed it necessary, directed to justices, officers and ministers in all ports except London. An examination of the contents of one of these commissions reveals:

²⁶⁷ HISTORICAL MANUSCRIPTS COMMISSION, *CALENDAR OF MANUSCRIPTS OF THE MARQUIS OF SALISBURY* 269 (1940), cited by L. S. Goodman, *Passports in Perspective*, 45 TEXAS L. REV. 219, 226 (1966). In 1608 letters patent were issued which placed exclusive control of movement from the English ports of Dover, Rye and Sandwich into the hands of the Warden of the Cinque Ports, CAL. OF STATE PAPERS, DOMESTIC, 1603-1610 432. On 21 January 1609 the Lord Warden appointed the mayor, minister and jurates of Winchelsea as commissioners to examine all persons who wished to embark from that port rather than Dover, Rye or Sandwich, CAL. OF STATE PAPERS, DOMESTIC, 1603-1610, 487.

²⁶⁸ CAL. OF STATE PAPERS, DOMESTIC, 1611-1618 362.

²⁶⁹ *Id.* at 300.

²⁷⁰ See for example, the licence issued to Mabel Griffith by the Privy Council on 19 July 1611 which warned her not to proceed to Rome, CAL. OF STATE PAPERS, DOMESTIC, 1611-1618, 61.

²⁷¹ CAL. OF STATE PAPERS, DOMESTIC, 1619-1623 462.

... to the Mayor and Recorder of the city of Chester and to customers, controllers, surveyors and farmers' deputies in the port of Chester. By the proclamation of July 9, 1607 no one was to travel abroad without licence from the Privy Council. This was found inconvenient and therefore this commission is appointed to give an oath to those that wish to cross the sea from the port, and upon oath to inquire the name, trade, place of birth and abode, state degree, cause of going, destination, and other fitting questions. This information is to be entered in a book. The oath of 3 Jac. I c. 4 for repressing recusants is to be taken and then permission to travel to be allowed. Dangerous persons are not to be permitted to pass but are to be committed to ward and the Council notified. Masters of ships are not to take unlicensed persons. This commission is in agreement with one previously granted for the port of London. . . .²⁷²

Other special commissions were granted by James I, his successors and the Council as the need for appointing further officials became apparent.²⁷³ The commissions spelt out in no uncertain terms the statutory and proclamatory authorities for precluding subjects from departing without the requisite licence,²⁷⁴ and contained directions for administering the Oath of Allegiance found in 3 Jac. I c. 4, s. 9.

It must be remembered that this was the age of colonization in North America when thousands left England²⁷⁵ but not without prior acquisition of a licence and taking the Oath of Allegiance. In 1625, the Father of International Law, the Dutch jurist Hugo Grotius, found that a right to travel existed in his interpretation of the law of nations.²⁷⁶ Twenty-five years later, Richard Zouche, the first Englishman to write about International Law, echoed the principles of Grotius in answering the question "whether a citizen or a subject may leave his country or state without obtaining permission."²⁷⁷ His views on this subject carried little weight against the entrenched British practice. Again in 1672 the same principle found another champion in the German jurist, Samuel Pufendorf.²⁷⁸

²⁷² 7 COMMONS DEBATES 1621, 413-414 (1935). The port of London in particular had become so crowded with persons seeking to leave that on 21 February 1620, a grant of 21 years was given to Anthony Uphill and Francis Joynour "to be clerks of the passes in the port of London and to William Smithsby to be clerk of the passes in other ports. They are to write all licences and passes granted by commissioners to anyone wishing to travel out of England . . ." *Id.* at 348; 7 T. RYMER, *FOEDERA*, *supra* note 220, at 188.

²⁷³ A number of circumstances arose in 1630 when the Council granted commissions to the mayors and certain other officials in Bristol, Beaumaris, Chester, Liverpool, and Workington, CAL. OF STATE PAPERS, DOMESTIC 1629-1631 185.

²⁷⁴ See the special commissions issued on 28 March 1623, 2 September 1628, 25 May 1630, 19 November 1630, 17 November 1635 and 18 July 1640 in T. RYMER, 7 *FOEDERA*, *supra* note 220, at 51; 8 T. RYMER, *FOEDERA*, *supra* note 220, at 273; 132, 9 T. RYMER, *FOEDERA*, *supra* note 220, at 19, 28; See also, the King's instructions to the Warden of the Cinque Ports issued on 2 September 1628, 8 T. RYMER, *FOEDERA*, *supra* note 220, at 275.

²⁷⁵ See J. C. HOTTEN, ORIGINAL LISTS OF EMIGRANTS TO AMERICA 160 (1894).

²⁷⁶ 2 HUGO GROTIIUS, *DE JURE BELLI AC PACIS* § 24.

²⁷⁷ RICHARD ZOUCHE, *JURIS ET JUDICII FEICIALIS SIVE JURIS INTER GENTES EXPLICATIO*, PART II § 2.

²⁷⁸ 8 SAMUEL PUFENDOFF, *DE JURE NATURAE ET GENTIUM*, §§ 2-3.

In 1628, a distinction appeared between passports received by the nobility and those given "persons of mean quality." When noblemen applied for a passport on behalf of themselves or their children in order to go abroad, they received a specimen signed by the King. A member of the other group would receive a passport signed by one of the Secretaries of State who had to "speak with the applicant."²⁷⁹ Two years later the distinction was made more specific and was embodied in a regulation²⁸⁰ in the following terms:

All Noble men and noble mens Children who are to pass the seas to have their Licence for travel or passport under his Majesties signature, others for persons of meaner qualitie granted by the Lordes are first to be signed by one of the principall Secretaries, who is to speake with the partie who demandes it, and take particular information of his Religion and condition.²⁸¹

It appears that occasionally an individual petitioned to the Privy Council to prevent someone from receiving the requisite licence. Lady Peyton made such a petition, wherefore,

. . . it was ordered that a caveat be entered in the Councelle Booke that noe lycence be past at the Board for Sir Edward Peyton to goe over unto forraigne partes, but that from tyme to tyme the Clarkes of the Councell attendant put their Lordships in mynde of the said paticion in case the Board shalbe moved for any such lycence, his Majesties principall Secretaries being already made acquainted therewith by direction of the Board, for the better preventing of passing any such lycence under his Majesties signature.²⁸²

Also during this period, recusants, who already had many fetters imposed upon their freedom of movement, found a further obstacle cast in their path in the Privy Council's order of 5 November 1628. Recusants were to be prevented from travelling abroad unless they presented sufficient sureties as bond and received a licence signed by one of the Principal Secretaries and the Lords of the Privy Council.²⁸³

Although many persons became authorized to issue and sign passports in this era, it was the Principal Secretary who was responsible for the peace of the country, and in an emergency, he could exercise his special powers to close ports, suspend passages or prevent suspect persons from departing.²⁸⁴

On 21 July 1635, the King issued a proclamation which called for the

²⁷⁹ 50 CLARENDON STATE PAPERS 36, cited by F. M. G. Evans, *THE PRINCIPAL SECRETARY OF STATE* 268 (1923).

²⁸⁰ 40 PRIVY COUNCIL REGISTER (1630), cited by I. E. R. Turner, *THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1603-1784*, 151 (1927).

²⁸¹ ACTS OF THE PRIVY COUNCIL, 1630 JUNE—1631 JUNE 106.

²⁸² Dated 17 June 1631, *id.* at 390.

²⁸³ ACTS OF THE PRIVY COUNCIL, 1628 JULY—1629 APRIL 224-25.

²⁸⁴ F. M. G. EVANS, *supra* note 279 at 269.

restraint of all his subjects except soldiers, mariners, merchants, their factors and apprentices from departing out of the realm "or any of the Dominions to foreign lands" without special licence.²⁸⁵ The reference to "Dominions" in this proclamation indicates that the same restraint was to operate in the British North American colonies.

We can gain an insight into the force of a proclamation issued during this era, by referring to Bacon's speech in the Star Chamber on 19 October 1597, when he said it was "a firm and forcible law, and of the like force as the common law or an Act of Parliament." On the same subject, Coke said on 16 October 1607, that "where the Common state or wealth of the people or kingedome require it, the king's proclamation bindes as a lawe, and neede not staye a parliamente."²⁸⁶

On 17 November 1635, the King sent a special commission to the Recorder of London, Sir Paul Pinder, and other officials requiring them to administer the Oath of Allegiance to persons wishing to go overseas from the port of London and to let them pass without any other licence in spite of previous legislation and his proclamation of 21 July 1635.²⁸⁷ The King was aware that many of his subjects actually departed without the required licence although there was both statute and proclamation in force against such practices. He attempted to eliminate the practice through measures sent out in the proclamations of 30 April 1637 and 1 May 1638, which ordered a restraint on the transporting of passengers to America without licence.²⁸⁸ Officials who failed to discharge their responsibilities in preventing illegal departures, upon discovery, lost their office and were imprisoned; a fate imposed on one of the searchers of Rye in 1637. In the Council's view the searcher's inaction constituted "such an abuse as cannot be answered."²⁸⁹ During the Interregnum the former practice of ensuring that subjects possess a licence to leave the realm was maintained. On 14 April 1649, Parliament ordered that passes for travel were to be granted only to persons faithful to itself²⁹⁰ and in a second order issued that day, Parliament pointed out that persons would be able to leave the country by a public passage only after depositing security as a guarantee that they would not act against it while abroad.²⁹¹ The Commonwealth Council of State which

²⁸⁵ 8 T. RYMER, *FOEDERA*, *supra* note 220, at 134-35; R. R. STEELE, *supra* note 150, at 203.

²⁸⁶ R. R. STEELE, *supra* note 150, at xxxi.

²⁸⁷ 9 T. RYMER, *FOEDERA*, *supra* note 220, at 28. On 10 March 1623, the same persons received commissions for granting licence, CAL. OF STATE PAPERS, DOMESTIC, 1619-1623 520.

²⁸⁸ 9 T. RYMER, *FOEDERA*, *supra* note 220, at 94 and 146. R. R. STEELE, *supra* note 150, at 214. See also, the King's special commission and orders directed to the Warden of the Cinque Ports on 18 July 1640, 9 T. RYMER, *FOEDERA*, *supra* note 220, at 19 and 16.

²⁸⁹ CAL. OF STATE PAPERS, DOMESTIC, 1637 451.

²⁹⁰ R. R. STEELE, *supra* note 150 at 345.

²⁹¹ R. R. STEELE, *supra* note 150, at 343-44. For a list of the persons to be granted licenses for foreign travel in 1651 see, CAL. OF STATE PAPERS, DOMESTIC, 1651 515-35.

replaced the Privy Council was responsible for issuing these licences.²⁹² In this period the Protectorate Government was cognizant of the movement of Royalist agents between the Continent and England. The well beaten paths lay between Ostend and Dover, and Calais and Dover, the two quickest and cheapest routes of crossing the Channel by packet boat. At Dover, protective measures were the responsibility of the commissioners of the passage. On 28 October 1653, the Council of State issued instructions to these commissioners to tighten security to "take bond from the owners and masters of all vessels in your port . . . not to transport beyond seas any persons without a licence . . . None of the commonwealth professing to be merchants may pass before being brought before the Council of State or yourselves, and receiving a passport. . . ."²⁹³ The clerk of the passage was obliged to register the names of all persons licenced to pass, and to write down a description of them, their dwelling place, day of passage, name of the vessel on which they were leaving and destination.

Periodically, the commissioners of the passage of various Channel ports received instructions from the Council of State to sharpen their vigilance as to persons authorized to leave the country.²⁹⁴ On at least one occasion, Cromwell found it necessary to personally contact the port authorities at Sandwich not to allow persons to pass overseas without a licence.²⁹⁵

The 1630 Regulations requiring noblemen and commoners to obtain specific signatures on licences for travel abroad were reissued in 1660.²⁹⁶

Our examination of the passport thusfar has centered on its use as an instrument for limiting or restricting foreign travel. A precursor of the role of the modern passport was one of the subjects cast in the Treaty of Peace and Commerce²⁹⁷ signed by Great Britain and Denmark at Copenhagen on 11 July 1670. Article 20 of the Treaty provides for letters of passport to accompany ships, goods and men of the respective States when visiting the territories of the other State. Although passports or sea-briefs were usually meant to apply to ships, in this case the Treaty provided "that a letter of passport might be required to be produced on land by men travelling." Hence, a stipulation calling for the state to provide its subjects with a travel document to enable them to identify themselves when abroad. As one jurist pointed out, it was an exceptional use of the passport at this time.²⁹⁸ Five years later, Charles II issued a proclamation relating to Art-

²⁹² See the examples given in E. R. TURNER, *supra* note 280, at 295-96.

²⁹³ CAL. OF STATE PAPERS, DOMESTIC, 1635-1654 221-22.

²⁹⁴ CAL. OF STATE PAPERS, DOMESTIC, 1654 243.

²⁹⁵ SANDWICH BOROUGH RECORDS, fols. ZB 2/120, 2/121 (Kent Archives Office, Maidstone), cited by G. R. Smith, *Royalist Secret Agents at Dover during the Commonwealth*, 12 HISTORICAL STUDIES, AUSTRALIA AND NEW ZEALAND 477, 481, n. 21 (1967).

²⁹⁶ 1 E. R. TURNER, *supra* note 280, at 395.

²⁹⁷ 1 BRITISH AND FOREIGN STATE PAPERS, 1812-1814 381; 1 HERTSLET'S COMMERCIAL AND SLAVE TRADE TREATIES 187.

²⁹⁸ K. DIPLOCK, *Passports and Protection in International Law*, 32 TRANSACT. GROT. SOC. 42, 45 (1946).

icles concluded between himself and the Government of Algiers which called for all Englishmen travelling in foreign ships to be in possession of passports containing their names and goods, and signed by the proper ministers.²⁹⁹

To return to the main theme, we find that the prohibition against sending children abroad to be educated in foreign seminaries contained in the 1584-85 Statute was brought to the public's attention in the proclamations issued by the King and Council on 3 and 12 February 1675,³⁰⁰ by the King on 8 January 1679³⁰¹ and further reiterated on 21 December 1679.³⁰² In 1679, it was said "our Lawes restraining most sorte of persons even from passing beyond Sea without leave askt and had from his Majestie or his Councill."³⁰³

William III was an avid traveller and went abroad many times during his reign. As a prelude to his departure in 1695, he left specific instructions for his Lords of the Cabinet Council to administer during his absence. Included in the instructions we find:

17. We leave it to you to give Passes and Licences to those that have Occasion to go beyond the Seas as you shall think fitt.³⁰⁴

There is some evidence that blanket restrictions against subjects leaving the realm during times of peace through the use of proclamations were no longer employed from the beginning of the 18th century although Sir Edward Northey, the attorney-general, writing to Nottingham on 25 October 1703 informed him that "as the law stands any subject may go abroad to any country at peace with her Majesty without any special licence, unless prohibited by writ or proclamation, except women and children under the age of one and twenty, who by the Statute of 1 James I, cap. 4, are prohibited to do so without licence from the Queen or Privy Council."³⁰⁵ In the first place the writ *ne exeat regno* was used now only on rare occasions. Acts of Parliament were employed many times as the method of preventing either classes of persons or individuals from going abroad.³⁰⁶ In 1718, Parliament attempted to curb an early brain drain of craftsmen and manufacturers; these persons were departing from Great Britain and the British Dominions for foreign countries to carry on their trade under better work-

²⁹⁹ R. R. STEELE, *supra* note 150, at 438. The Proclamation was issued on 22 December 1675.

³⁰⁰ *Id.* at 437.

³⁰¹ *Id.* at 445.

³⁰² *Id.* at 449.

³⁰³ Stated on 12 May 1679, 2 E. R. TURNER, *supra* note 280, at 157.

³⁰⁴ 2 E. R. TURNER, *THE CABINET COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1622-1784* 231 (1930-32). Similar instructions were issued by George I in 1719 and by George II in 1741, 1752 and 1755. *Id.* at 232, 234.

³⁰⁵ CAL. OF STATE PAPERS, DOMESTIC 1703-4 172.

³⁰⁶ 10 SIR W. HOLDSWORTH, *supra* note 24, at 392.

ing conditions and more pay.³⁰⁷ The Act of 1718 provided that after 1 May 1719, manufacturers and craftsmen could be forced to deposit security not to depart out of the realm for the purpose of carrying on their trade or calling in foreign places; imprisonment was sanctioned until security was found. In the same year, Sir William Thomson, the British solicitor-general, rendered an opinion as to whether the King's prerogative of prohibiting his subjects from going abroad could still be exercised. He relied on the Statute of 5 Richard II c. 2 as his authority for finding that "the King may prohibit his subjects from going out of the realm without license."³⁰⁸ This Statute had not been resurrected since its repeal in the 17th century.

During the furor of the South Sea Bubble in 1720, Parliament passed an *Act for restraining the sub-governor, deputy-governor, directors, treasurer or cashier, deputy-cashier and accountant of the South-Sea company, from going out of this kingdom for the space of one year, and until the end of the then next session of parliament, and for discovering their estates and effects, and for preventing the transporting or alienating the same.*³⁰⁹ Parliament reacted in a similar fashion when another outrageous fraud was discovered in 1732.³¹⁰

Meanwhile on the international plane, Emer de Vattel, the Swiss jurist, recognized that one of the major barriers to international trade was caused by the travel restrictions of certain states, especially through the existence of rigid passport systems. In 1758, he wrote:

In a time of peace and tranquillity, when the State has no actual need of all its citizens, the welfare of both State and citizens requires that persons should be allowed to travel in the interests of their business, provided they be at all times ready to return when called back at the need of the State. It is not to be supposed that a man has bound himself to the society of which he is a member in such a way as to be unable to leave the

³⁰⁷ 5 GEO. I, c. 27, 14 STATUTES AT LARGE 117.

³⁰⁸ W. FORSYTH, CASES AND OPINIONS ON CONSTITUTIONAL LAW 164 (1869).

³⁰⁹ 7 GEO. I, c. 1, 14 STATUTES AT LARGE 299.

³¹⁰ See, 5 GEO. II, c. 32,

An act to restrain Sir Robert Sutton, knight of the bath, Sir Archibald Grant, baronet, Denis Bond, William Burroughs, esquires, Richard Woolley and Thomas Warren, from going out of this kingdom for the space of one year and until the end of the then next session of parliament; and for discovering their estates and effects, and to prevent the transporting or alienating the same; and to oblige William Squire to surrender himself at a time and place mentioned in the act, and to give security for his not going out of this kingdom for the space of one year and until the end of the then next session of parliament, and for discovering his estate and effects, and to prevent the transporting or alienating the same; and for committing the aforesaid William Burroughs to the prison of the Fleet, until he shall have complied with the directions of this act,"

16 STATUTES AT LARGE 361. Acts of Parliament to restrain individuals from departing the realm without a licence were also passed in 1782, 22 GEO. III, c. 54, "An act for restraining sir Thomas Rumbold baronet, and Peter Perring esquire, from going out of this kingdom, for a limited time; and for discovering their estates and effects, and preventing the transporting or alienating the same," and, 22 GEO. III, c. 69, "An act of compelling John Whitehill esquire to return into this kingdom; and for restraining him, in case of his return, from going out of this kingdom for a limited time; and for discovering his estate and effects, and preventing the transporting or alienating of the same," 34 STATUTES AT LARGE 78, 114, respectively.

country when his business affairs require it and when he can absent himself without harm to his country.

. . . there are States in which the laws are so severe as to forbid any one at all from leaving the country without formal passports, which are only obtained with difficulty . . . (in this case) the sovereign is abusing his power and reducing his subjects to an unendurable slavery if he refuses them permission to travel on business when he might grant it to them without harm or danger to the State.³¹¹

Following the conclusion of the Seven Years War in 1763, the travel restrictions in England were expressly removed; however, the passport requirement in order to leave the country continued.³¹² In speaking of the practice of his own day, Blackstone wrote in 1765, that "every body has, or at least assumes, the liberty of going abroad when he pleases."³¹³ The use of this guarded language indicates that the Englishman did not have an unqualified liberty to leave England. Twenty-three years later, Sir Archibald MacDonald, the attorney-general of the day, was asked how far the King may restrain his subjects from going abroad (the question arose with regard to mariners). He found that a writ could be used to stop the individual, and any segment of the population could be impeded by proclamation. It is interesting to note that he found "the constant practice of prohibiting mariners, by proclamation, from departing the realm for the purpose of entering into foreign service, at times when the state of Europe would render it dangerous to weaken the strength of the nation,"³¹⁴ thus relegating the exercise of the limitation to times of national emergencies.

Hereinafter, we approach the subject from a different perspective. We shall trace the restrictions on freedom of movement of aliens trying to leave England which will provide an insight into the practice concerning Englishmen. One piece of war legislation passed in 1798 stated that:

. . . from and after the passing of this act, it shall not be lawful for any alien to leave the kingdom, without a passport for that purpose first obtained from one of his Majesty's secretaries of State, or from some person authorized by his Majesty to grant such passport; which passport shall be produced to the proper Officer of his Majesty's customs, at the port or place where such alien shall embark for the purpose of leaving this realm. . . .³¹⁵

The alien in this situation received a passport from the British authorities in order to leave the kingdom lawfully. Once issued with the passport, the alien had to depart with due diligence according to the endorsement in

³¹¹ EMER DE VATTTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* §§ 221-2 (1916).

³¹² CAL. OF HOME OFFICE PAPERS OF THE REIGN OF GEORGE III, 1760-1765 246, 445, 503.

³¹³ 1 BLACKSTONE'S COMMENTARIES 266.

³¹⁴ W. FORSYTH, *supra* note 308, at 164-66.

³¹⁵ 38 GEO. III, c. 50, s. 8, 41 STATUTES AT LARGE 681.

the passport otherwise he would incur a penalty.³¹⁶ It seems highly unlikely that an Englishman would be allowed to leave during the war without going through the formality of obtaining a passport as he would have to be able to prove his nationality and identity to the port authorities.

When the war ended in 1802, the passport requirement for aliens was repealed.³¹⁷ On the resumption of hostilities in the following year, aliens were obliged once again to obtain a passport for departure.³¹⁸ The peace of 1814 brought the repeal of this requirement³¹⁹ but with the outbreak of war in 1815, it was reintroduced³²⁰ and was enforced until cleared from the statute-book in 1816.³²¹ I submit that parallel restrictions on the free egress of Englishmen would apply during the same periods, that is, the need of an Englishman to readily identify himself and his status to the port authorities.

In 1826, Parliament passed *An Act for the Registration of Aliens*³²² which provided for the first time that,

. . . every Alien who shall after the Commencement of this Act arrive in any Part of the United Kingdom from Foreign Parts, or pass from *Great Britain* or from *Ireland* to *Great Britain*, shall immediately after such Arrival or Passage deliver to the Chief Officer of the Customs at the Port of Debarkation any Passport which shall be in his or her Possession . . . and if such Alien coming into this Realm shall neglect or refuse to deliver up his or her Passport, he shall forfeit and pay the Sum of Five Pounds. . . .³²³

On leaving the country, the alien could have the passport that he surrendered on entry, returned to him by prior notification to the proper authorities.³²⁴ By this date, the modern passport system was established in a num-

³¹⁶ Section 10.

³¹⁷ An act for repealing several acts for establishing regulations respecting aliens arriving in this kingdom, or resident therein, in certain cases; and for substituting other provisions in lieu thereof, 42 GEO. III, c. 92, 43 STATUTES AT LARGE 850.

³¹⁸ An act to repeal an act, passed in the last session of parliament, for establishing regulations respecting aliens arriving in this kingdom, or resident therein; and for establishing, until three months after the ratification of a definitive treaty of peace, regulations respecting aliens arriving in this kingdom, or residing therein, in certain cases, 43 GEO. III, c. 155, s. 27, 44 STATUTES AT LARGE 996.

³¹⁹ An Act to repeal an Act for establishing Regulations respecting Aliens arriving in or resident in this Kingdom, in certain cases; and for substituting other Provisions, until the End of the next Session of Parliament, in lieu thereof, 54 GEO. III, c. 155, 54 STATUTES AT LARGE 808.

³²⁰ An Act to repeal an Act of the last Session of Parliament, for establishing Regulations respecting Aliens arriving in this Kingdom, or resident therein; and to establish, for Twelve Months, other Regulations respecting Aliens arriving in this Kingdom, or residing therein, in certain Cases, 55 GEO. III, c. 54, s. 27, 55 STATUTES AT LARGE 195.

³²¹ An Act for establishing Regulations respecting Aliens arriving in or resident in this Kingdom, in certain cases, for Two Years from the passing of this Act, and until the End of the Session of Parliament in which the said Two Years shall expire, if Parliament shall be then sitting, 56 GEO. III, c. 86, 56 STATUTES AT LARGE 453.

³²² 7 GEO. IV, c. 54, 66 STATUTES AT LARGE 178.

³²³ Section 3.

³²⁴ Section 11.

ber of European countries³²⁵ and Great Britain was following a beaten path. Two points follow from the passage of this statute. First, an Englishman landing in Great Britain had to establish that he was in fact a citizen so that he must have carried a passport or some other accepted document which would prove his identity and status to the landing authorities. Second, because a number of countries required persons seeking entry to their territory to present identity papers, it was incumbent upon the traveler to possess some internationally recognized identity document. The fact that aliens "could have" their passport returned before departure suggests that there was a relaxation of the passport requirement for exit from the country.

In 1836, Parliament passed *An Act for the Registration of Aliens*³²⁶ whereby every alien arriving in the United Kingdom was obliged to present any passport in his possession to the Chief Officer of Customs. On departure, the alien was not required to produce his passport. This Act repealed the 1826 Act. We know from the evidence taken before the Select Committee on Laws affecting Aliens in 1843 that the 1836 Act soon fell into disuse although it was not repealed until 1905.

In 1844 *An Act to amend the Laws relating to Aliens*³²⁷ was passed which provided:

. . . every Alien now residing in, or who shall hereafter come to reside in, any Part of *Great Britain or Ireland* with Intent to settle therein, shall enjoy all the Rights and Capacities which a natural-born Subject of the United Kingdom can enjoy or transmit, except . . . Rights and Capacities, if any, as shall be specially excepted. . . .³²⁸

The Secretary of State was empowered to make the exceptions and on 12 March 1854, he formally declared to be an exception, that which had been standard practice since 24 August 1850, "other than such as may be conferred upon him by the grant of a passport from the Secretary of State to enable him to travel in foreign parts." Thus, the naturalized Briton did not carry into foreign countries the rights and capacities of a natural-born British citizen but did have the benefit of possessing a British passport. A further restriction was placed on the naturalized Englishman in 1858 by regulating that if he absented himself from the United Kingdom for six months without a written licence from the Secretary of State, his rights and capacities as an Englishman would cease and determine.³²⁹ Ten years ear-

³²⁵ E. Reale, *Le Probleme des Passeports* 50 RECUEIL DES COURS 89, 97-104 (1934).

³²⁶ 7 WILL. IV, c. 11, 76 STATUTES AT LARGE 46.

³²⁷ 7 & 8 VICT. c. 66, August 6, 1844, 84 STATUTES AT LARGE 292.

³²⁸ Section 6.

³²⁹ 25 ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE, REPORT Appendix, 9 (1869). The form of Licence to be absent from the United Kingdom issued to a naturalized Englishman is as follows:

Whereas on the day of — in the year of our Lord One Thousand eight hundred and — D.E., one of Her Majesty's principal Secretaries of State in pursuance of

lier, however, Lord Palmerston voiced the opinion that "it is well known that by the laws of Great Britain no restraint can, except in very special cases, be placed on the perfect liberty of every British subject to leave the realm. . . ." ³³⁰

Passports were still required for travel in 1858 as brought out in the case of *R. v. Simon Bernard*³³¹ which arose out of the attempted assassination of Emperor Napoleon III and the Empress Eugenie of France. At the same time, however, the British Secretary of State for Foreign Affairs, the Earl of Clarendon, declared that the British Government attached no importance to passports.³³² Beginning in the 1860's, perhaps due to the announcement by Emperor Napoleon III that commencing 1 January 1861, British travellers would be able to enter France without any passport or permit, the passport systems were gradually abolished. One optimistic writer heard the knell of passports and in 1861 hastened to sketch "this toothless old Cerberus (the passport) before it becomes a fossil, and passes into the dominions of the antiquary."³³³ British passports continued to be issued to British subjects, native or naturalized in Great Britain or in the Colonies.³³⁴ In writing about state's practice at this time, Egidio Reale

the statute 7 & 8 Victoria, c. 66 intialed "An Act to amend the laws relating to aliens" did certify that A.B. an alien then residing at London, had presented to D.E. a memorial praying him to grant to the said A.B. the certificate therein mentioned. And whereas D.E. after due enquiries did in and by the said certificate grant to the said A.E. all the rights and capacities of a natural born British subject. Provided always that all the said rights and capacities should be and were granted to the said A.B. on condition that he should continue to reside permanently within the United Kingdom, and that if at any time thereafter he should voluntarily be absent from the United Kingdom for a period of six months at any one time without licence in writing under the hand of one of Her Majesty's principal Secretaries of State, he should be deemed to have ceased to reside permanently within the United Kingdom, and then and in such case the said certificate and rights and capacities thereby granted should be absolutely cease and determine.

Now I the undersigned F.G. being one of Her Majesty's principal Secretaries of State, do hereby at the request of the said A.B., and for divers good causes and reasons, give and grant to the said A.B. full licence to be absent from the United Kingdom for a period not exceeding — months at one time in addition to the said period of six months: Provided always, and this license is on the condition that if the said A.B. shall voluntarily be absent from the United Kingdom for a period exceeding the said months at one time in addition to the said period of — months without the further license in writing under the hand of one of Her Majesty's principal Secretaries of State, the said certificate and all the rights and capacities thereby granted, shall, notwithstanding the licence, absolutely cease and determine.

In witness whereof I have hereunto subscribed my name this — day of — 18—

(Signed) E.G.

From the ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATIONS AND ALLEGIANCE 95-96.

³³⁰ PARLIAMENTARY PAPERS RELATING TO LORD ASHBURTON'S MISSION, ANNEX TO THE REPORT 41, cited by A. COCKBURN, NATIONALITY 84-85 (1869).

³³¹ (1858) 8 St. Trials (N.S.) 887.

³³² N. W. SIBLEY, *supra* note 23, at 27.

³³³ 36 CHAMBERS' EDINBURGH JOURNAL, 136-140, 137 (1861).

³³⁴ On 21 July 1863 the British Foreign Office issued a circular to Her Majesty's Representatives and Consuls instructing that a foreigner naturalized in a British Colony was not entitled to claim a British passport. As a result of remonstrations by Canada against this practice,

stated that "the system of compulsory passports for both internal and foreign travel was at first mitigated and later suppressed except during times of emergency."³³⁵ It seems that the British practice of calling for its citizens to possess a passport for travel abroad was relaxed during these years as the Foreign Office recognized that British subjects were no longer required to possess a passport for entry to many European countries.³³⁶ On the eve of World War I, passports were required in Europe for entry to Rumania, Bulgaria,³³⁷ Turkey and the Austrian provinces of Bosnia and Herzegovina.³³⁸

Following the outbreak of World War I, *The Aliens Restriction Act, 1914*³³⁹ was passed which provided that if a state of war with a foreign Power existed or if a great emergency had arisen or there was an imminent danger, restrictions could be imposed on aliens by an Order in Council to regulate amongst other things, their embarkation or departure from the United Kingdom. The Great War saw a number of Orders passed on the subject of aliens, consolidated in *The Aliens Restriction (Consolidation) Order, 1914*,³⁴⁰ which required aliens to have a permit issued by a Secretary of State before they could leave the country.³⁴¹ Thereunder, alien officers were given authority to detain and examine all persons leaving any port in the United Kingdom "and to require the production of any documents by such persons."³⁴² As a defensive precaution throughout the war, any British citizen who wanted to leave the country had to be able to prove that he was not an alien. For this purpose, and for the purpose of proving his identity to the authorities of the receiving State, wherever he was bound, the Englishman had to carry a valid British passport.

When the Great War ended on 11 November 1918, one would have expected a gradual erosion of the passport requirement for the departure of British citizens from their homeland and perhaps even the eventual abolition of the practice. Such was not the case as the British people were soon

the British Foreign Office announced a change on 10 March 1865 that British passports should henceforth be granted to persons naturalized in the Colonies. ROYAL COMMISSIONERS FOR INQUIRING INTO THE LAWS OF NATURALIZATION AND ALLEGIANCE 14, 95-96.

³³⁵ 12 ENCYC. SOC. SCI. 14 (1937); see also E. REALB, *supra* note 1, at 107.

³³⁶ In 1897 the Foreign Office List indicated that British subjects were free to enter Belgium, France, Holland, Italy, Denmark, Norway, and Sweden without a passport, N. W. SIBLEY & A. ELIAS, *THE ALIENS ACT AND THE RIGHT OF ASYLUM* 44, n. 2 (1906). The historian, A. J. P. TAYLOR writes that until August 1914 an Englishman "Could travel abroad or leave his country for ever without a passport of any sort of official permission," A. J. P. TAYLOR, *ENGLISH HISTORY 1914-1945*, 1 (1965).

³³⁷ The procedure for a British subject obtaining a passport for travel to Russia is discussed in R. V. BRAILSFORD, 2 K.B. 730 (1905).

³³⁸ 12 ENCYC. SOC. SCI. 14 (1937).

³³⁹ 4 & 5 GEO. c. 12.

³⁴⁰ STATUTORY RULES AND ORDERS, 1914, No. 1374.

³⁴¹ Articles 8 and 10.

³⁴² Article 15.

told.³⁴³ The 1914 Act remained in force and was fortified further by *The Aliens Restriction (Amendment) Act, 1919*.³⁴⁴ The burden of proof, which lay upon the individual to prove that he was not an alien during the war, remained intact despite the peace. Originally, the Secretary of State was to exercise the powers in the 1914 Act in times of emergency, however, by virtue of the 1919 Act, he continued to exercise these powers on a year to year basis pursuant to the Expiring Law Continuance Acts although no state of emergency actually existed.

Under the *Aliens Order, 1920*,³⁴⁵ the appointed officers were given the power to examine any person leaving a port in the United Kingdom who was reasonably suspected of being an alien, and to require the production of any documents by such person.³⁴⁶ The onus of proof of nationality remained upon the individual. To ensure that all British citizens possessed a passport for travel, the Order further provided that every person over sixteen years of age landing or embarking in the United Kingdom had to possess a passport issued not more than five years before the date of his arrival or some other document establishing his nationality and identity to the satisfaction of an immigration officer.³⁴⁷

In speaking of the year 1922 as the first orderly year which Britain had known since the outbreak of war, A.J.P. Taylor, the historian, recalled the standard British reply whenever abolition of passports was suggested, that "the passport was, of course, required by foreign governments."³⁴⁸ He adds, "British citizens do not need a passport to leave this country [the United Kingdom] in peacetime nor to return to it, though the authorities try to conceal this."³⁴⁹

In connection with the Hague Conference for the Codification of International Law on Nationality, 1930, one extract of discussion from a delegate summed up conditions as follows:

There has, however, been a recent and totally unjustifiable invasion by Foreign Office officialdom of the subject's right to leave and return to his country. I refer to the requirement of the production of a passport at ports of embarkation and return. At common law a British subject is free to leave his country at will and return to his country at will. There is no statutory or legal justification for requiring a British subject who wishes to return to England to produce a British passport. Emigration officers do in fact require to see a British passport. It is submitted that they are not entitled to do this and that if they detain a British subject who refuses

³⁴³ *The Times*, December 10th, 1918, p. 5.

³⁴⁴ 9 & 10 GEO. V, c. 92.

³⁴⁵ STATUTORY RULES AND ORDERS, 1920, No. 448 as amended by No. 2262.

³⁴⁶ Article 16(3).

³⁴⁷ Article 15(1).

³⁴⁸ A. J. P. TAYLOR, *supra* note 336, at 163, n. 1.

³⁴⁹ *Id.*

to produce any passport they are liable to an action for wrongful imprisonment.³⁵⁰

An incident in 1937 revealed that although passports were required to leave the United Kingdom, once the travel document was obtained lawfully the Crown lacked the power to prohibit the individual, on an *ad hoc* basis, from leaving the country; this was the situation when a number of clergymen prepared to leave England to investigate religious conditions in Spain, contrary to the Foreign Office's wishes.³⁵¹

In pursuance of the *Emergency Powers (Defence) Act, 1939*,³⁵² the *Defence (General) Regulations, 1939*,³⁵³ were passed which placed restrictions on movement of persons entering and leaving the United Kingdom.³⁵⁴ On the day that the Second World War began these stringent measures were announced to the British public by the press.³⁵⁵ Such measures remained in force after the cessation of hostilities although a relaxation of the exit permit requirement for British subject was announced³⁵⁶ on 1 October 1945; nevertheless, the passport requirement continued.

If we look to the present situation, we find *The Aliens Order, 1953*³⁵⁷ as the governing regulation which derives its force from the parent Act of 1914. The Order proscribes that every person over the age of sixteen years who lands or embarks in the United Kingdom can be required to produce to an immigration officer either a valid passport furnished with a photograph of himself or some other document satisfactorily establishing his identity and nationality.³⁵⁸ Any person who refuses to produce any document to the immigration officer or to furnish him with any information which the said officer may reasonably require for the purpose of the Order is guilty of an offence against the Order³⁵⁹ and can be arrested without a warrant by an immigration officer or a constable.³⁶⁰ An immigration officer may examine any person seeking to land or embark in the United Kingdom for the purpose of ascertaining whether that person is or is not an alien.³⁶¹

Professor Street, in his book entitled *Freedom, The Individual and The*

³⁵⁰ 16 TRANSACT. GROT. SOC. 90 (1930).

³⁵¹ RIDGE'S CONSTITUTIONAL LAW 426 (7th ed. 1939).

³⁵² 2 & 3 GEO. VI, c. 62.

³⁵³ 1 STATUTORY RULES AND ORDERS, 1939, No. 927, at 715.

³⁵⁴ Regulation No. 18.

³⁵⁵ *The Times*, September 4th, 1939, p. 13.

³⁵⁶ *The Times*, October 1st, 1945, p. 2. Gradually, the remainder of the permit restrictions were removed; see for example, THE PASSENGER TRAFFIC ORDER, 1946, 2 S.R.&O., 1946, No. 411, 29.

³⁵⁷ THE ALIENS ORDER, 1953, STATUTORY INSTRUMENTS 1953, No. 1671.

³⁵⁸ Article 7(1).

³⁵⁹ Article 25(3).

³⁶⁰ Article 28(1).

³⁶¹ Article 7(2).

Law, asserts that in spite of these provisions, the United Kingdom citizen cannot be detained from departing by an immigration officer acting under the Order, provided that the subject has duly answered the questions put to him by the immigration officer in the course of his examination and has produced a passport or some alternative evidence of his identity and nationality. He adds that if the person does not produce satisfactory evidence but is a United Kingdom citizen, he can still leave the country despite *The Aliens Order, 1953*.³⁶² It is also relevant that the Home Secretary stated in the House of Commons on 11 June 1959 that circumvention of *The Aliens Order, 1953*, was not impossible. His statement came in connection with the case of the spy, Klaus Fuchs. On his conviction for breach of the Official Secrets Acts, Fuchs, a naturalized British subject, was deprived of his British nationality. The Home Secretary, in dealing with the question of Fuchs' freedom of movement after his release from prison, said:

If Fuchs wishes to leave the country he could, in theory, as an alien be refused leave to embark under the Aliens Order. I should like to add that, as a matter of policy, it seems wrong in principle to attempt to use that power to prevent a man whom we have deprived of British nationality leaving the United Kingdom if he so desires.³⁶³

In the 1950's, the United Kingdom concluded agreements with both France and Belgium on the reciprocal waiver of the passport requirement for sea travellers visiting the other Party's territory for short periods of time as excursionists.³⁶⁴ On 1 March 1956, the question was asked in the House of Commons whether the Home Office would grant similar no-passport facilities to air travellers as excursionists to the Continent. The reply was negative.³⁶⁵

Periodically, the Secretary of State for Foreign Affairs has been asked whether he would consider abolishing passports, that is, allow the British citizen the exercise of his legal rights. His standard reply runs along these lines:

It is still the position that British subjects travelling abroad need to be able to establish readily their identity and nationality both to facilitate their passage through the various frontier controls and in the event of their requiring assistance and protection of their own Government. It is the

³⁶² H. STREET, *FREEDOM, THE INDIVIDUAL AND THE LAW* 272 (1963). On 4 July 1957, the Secretary of State for the Home Office admitted in the House of Commons that "there is no power to refuse a British subject leave to embark," 572 *PARLIAMENTARY DEBATES (HOUSE OF COMMONS), FIFTH SERIES* 1283 (1956-57).

³⁶³ 606 *PARLIAMENTARY DEBATES (HOUSE OF COMMONS), FIFTH SERIES*, 1176 (1958-59).

³⁶⁴ In the early years the excursion period was 24 hours. Gradually the period has been increased to 60 hours.

³⁶⁵ 549 *PARLIAMENTARY DEBATES (HOUSE OF COMMONS), FIFTH SERIES WRITTEN ANSWERS* 143 (1955-56).

view of Her Majesty's Government that the passport is the most satisfactory document for these purposes.³⁶⁶

Although the United Kingdom introduced a British Visitor's Passport on 15 March 1961 which has further eased the difficulties encountered by citizens in leaving the country, the legal position remains clear, a United Kingdom citizen is at liberty to go abroad without any passport. Nevertheless, regulatory schema which we have observed, allow the executive to perplex the subject by continuing its grasp on him whenever he seeks to leave the country without producing his passport. A challenge in the courts is required to terminate this infringement on the citizen's rights, and that day may finally be at hand.³⁶⁷

³⁶⁶ Reply in the House of Commons made on 21 January 1959, 598 PARLIAMENTARY DEBATES (HOUSE OF COMMONS), FIFTH SERIES 31 (1958-59). See, similar statements made in the House of Commons on 17 December 1956, Vol. 562, 1956-57, *Written Answers*, col. 111, and on 18 February 1959, Vol. 600, 1958-59, *Written Answers*, col. 49.

³⁶⁷ Apparently, Mr. Ian Colvin, a well-known British journalist, has decided to make himself the subject of a test case; *The Times*, May 24, 1968, p. 8.